Law Reform Commission of Canada
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REPORT

independent administrative agencies

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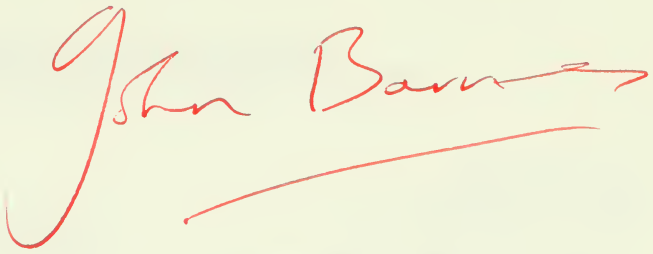

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REPORT 26

INDEPENDENT ADMINISTRATIVE AGENCIES

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REPORT

ON

INDEPENDENT ADMINISTRATIVE AGENCIES

A Framework For Decision Making

March, 1985

The Honourable John Crosbie, P.C., Q.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada.

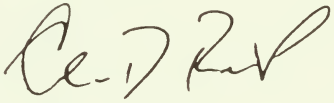
Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report, with our recommendations on the studies undertaken by the Commission on independent administrative agencies.

Yours respectfully,

Allen M. Linden
President

Louise Lemelin, Q.C.
Commissioner



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Preface

The *First Research Program of the Law Reform Commission of Canada* (LRCC, 1972) announced in 1972 an intention to study, among other subjects relating to administrative law, "the broader problems associated with procedures before administrative tribunals" (p. 18). By the time the *Second Annual Report 1972-73: The Worst Form of Tyranny* (LRCC, 1973) was published, it had become clear "that too little is known about the workings of administrative tribunals, that the practice of a tribunal cannot be understood without reference to its context and that the legal framework for a tribunal makes little sense without an understanding of its practices" (p. 24). Consequently, we decided to embark upon a series of studies that would help to expose these "broader problems" and to provide information upon which reform could be based.

What resulted were two series of published Study Papers. The first examined in detail eleven federal administrative agencies: the Immigration Appeal Board (Hunter and Kelly, 1976), the Atomic Energy Control Board (Doern, 1976), the National Parole Board (Carrière and Silverstone, 1976), the Unemployment Insurance Commission (Issalys and Watkins, 1977), the National Energy Board (Lucas and Bell, 1977), the Canadian Transport Commission (Janisch, 1978), the Pension Appeals Board (Issalys, 1979), the Anti-dumping Tribunal (Slayton, 1979), the Canadian Radio-television and Telecommunications Commission (Johnston, 1980), the Canada Labour Relations Board (Kelleher, 1980), and the Tariff Board (Slayton and Quinn, 1981). These studies were conducted at different times, and by different researchers, but all aimed at describing how individual agencies actually operated. Although limited in design and scope, they provided a useful window on the workings of administrative agencies. As well, they demonstrated that the "broader problems" we were concerned with involved more than discrete questions about agency procedure. In administrative law, as in other branches of the law, institutions, substance and procedure tend to be intertwined.

The second series of Papers was concerned with issues cutting across the whole spectrum of agencies. Commission researchers examined the political environment of agency decision making, culminating in the publication of two Study Papers (Vandervort, 1979; Slatter, 1982). Studies on access to information (Franson, 1979) and public participation (Fox, 1979) touched upon issues related to the role of "parties" in agency decision making. A further study looked at the role of the Federal Court in administrative law (Mullan, 1977). Another explored the potential of an administrative council as a way of providing ongoing advice about the workings of the federal administrative process (Leadbeater, 1980). Yet another catalogued the myriad discretionary powers that can be found in the *Revised Statutes of Canada* (Anisman, 1975). Unpublished studies were also

prepared in the context of this work. They examined the ombudsman (*Analysis of Ombudsman Case Files*, 1975); the concept of court of record (Picher, 1976); the history of agencies (Hyson, 1975); and issues such as agency membership (Andrew and Pelletier, 1976), appeals to the Federal Court (Leadbeater, 1977), agency conflict of interest and bias (Fox, 1981), and codification of administrative procedure (Hall, 1982; Marvin, 1982). One even recommended a multidisciplinary approach to administrative law reform (Doern *et al.*, 1974).

In 1980 the Commission drew together the various strands of this research in Working Paper 25, *Independent Administrative Agencies* (LRCC, 1980). That Working Paper dealt with a wide range of issues, attempting to present them within a comprehensive overview of the federal administrative system. Reactions to the Working Paper came, happily, not only from lawyers, but also from others (for example, Thomas, 1984). They were generally favourable. Many of its tentative recommendations for reform were well received, indeed welcomed. As a consultation document it has proved to be quite successful. It has allowed us to engage in discussions with a variety of individuals and groups, including the agencies themselves, in an effort to refine our view of the system. Consultation extended into the spring of 1984, when a preliminary draft of this Report was the subject of numerous consultative meetings. It is from these meetings and discussions that many of our perceptions and assumptions about the federal administrative process have evolved.

In the meantime, we have continued to study certain issues that were raised for discussion in Working Paper 25 (LRCC, 1980), such as administrative procedure and administrative appeals. We also contemplate further work on possible institutional reforms, such as the creation of an administrative council and the institution of a federal ombudsman. Other aspects of our current research program, which were not dealt with in Working Paper 25 (LRCC, 1980), have an important bearing on the work of independent administrative agencies. In particular, we are studying issues relating to efforts to achieve compliance with administrative policy. We have also begun to consider a reform of the legal status of federal institutions, including the Crown, which will have important implications for administrative agencies.

We have taken considerable interest in the activities of other groups investigating various aspects of federal administrative and regulatory reform in Canada. These include the Lambert Commission, the Peterson Committee, the Standing Joint Committee on Regulations and Other Statutory Instruments, and the Economic Council of Canada. Each has put forward conclusions and recommendations that are, in many respects, consistent with ours. The efforts of other groups, for instance the Treasury Board Office of Regulatory Reform, the Privy Council Office, and the Administrative Law Reform Group at the Department of Justice, also are evidence of the widespread interest in the area.

In spite of intense activity over the past decade, this Commission has reported neither its conclusions, nor its philosophical approach, concerning the roles and activities of the agencies it has studied. The complexity of the issues that have surfaced during the course of these studies, the intricacies of the interrelationships among them, and the need to understand them within an evolving governmental context combine to make the task of

preparing such a Report a challenging one. However, we think that it is timely, with the advent of both a new Parliament and a new Government, to complement the detailed information and analysis that exist in the work we have described with an overview that places a range of contemporary administrative law issues within a wider framework for discussion. In this way we hope to chart a course for reform, and to stimulate further analysis and discussion of these important issues within a constituency that includes administrators, lawyers, judges, parliamentarians, government officers, students of the administration and, of course, those who are affected by administrative action and seek to influence its direction.

In preparing this Report we have had the benefit of the views and advice of a great many individuals. Many of those who have made a contribution are listed in Appendix B, but it would be impossible to document completely the names of those who have influenced our final conclusions. We have confined our list to those who have had direct contact with us in meetings and consultations held in connection with Working Paper 25 (LRCC, 1980) and earlier drafts of this Report.

We wish to single out for special comment two persons who contributed significantly to our efforts, but who passed away before this Report could be finalized. Allan O. Solomon, Q.C., a retired Chairman of the Canadian Pension Commission, was one of our special advisers from 1982 to 1984, and even before that had been a valuable aid to us in a consultative capacity. His insight, experience and good sense helped us to discover many aspects of the federal administrative process to which we would not otherwise have been exposed. Professor Jacques Fortin, former Vice-President of the Commission, always made light of his knowledge of administrative law. Nonetheless, through his commitment to principle and structure in our legal system, and by his keen analytical skills, he posed challenges that influenced both the shape and content of this Report. The untimely passing of both these colleagues has been an enormous loss for us.

Finally, we wish to acknowledge the valuable assistance of several persons whose contribution has not otherwise been noted in these pages. Joan Arnold prepared initial drafts of portions of the Report. Mary Jane Jones, Alison Harvison Young, Jasper Meyers, Andrew Coombs and David Wilson contributed significantly to the collation of comments, worked diligently on the documentation and assisted us in various other regards. Laura Zagolin offered extremely helpful editorial suggestions. And Irene Harrison performed a host of administrative and editorial tasks as we worked towards this final version.

CHAPTER ONE

Introduction

When the Board of Railway Commissioners was established in 1903, no one could have predicted the scope and influence of independent administrative agencies some eighty years later. To many, the idea of placing the authority to decide questions affecting both public and private interests in a body that was neither a government department nor a court appeared to fly in the face of the traditions of British parliamentary Government. Yet, independent administrative agencies have proliferated. They have continued to be created in response to new needs. And while we do not seek either to legitimize or question any role they presently play, we are confident that they will remain for some time an important aspect of modern government.

An examination of the historical development of independent administrative agencies shows that they emerged not as the result of a well-defined approach to the resolution of public administration issues, but rather as *ad hoc* responses to problems presented by a rapidly evolving social and political structure (see LRCC, 1980: Chap. 1; Hyson, 1975; Vandervort, 1979: 9-11; Economic Council of Canada, 1979: Chap. 2). The agency model, which was largely inspired by corresponding developments in the United States, has had a special attraction for governments looking for ways to cope with their growing involvement in social and economic regulation.[1] Among the factors commonly thought to have led to the creation of independent administrative agencies are the desire to divert the responsibility for the resolution of politically sensitive issues to discrete, non-partisan governmental bodies; the need for specialization and expertise to manage progressively more complex governmental tasks; the perceived inability of a then partisan, non-professional civil service to perform such tasks; and a reluctance to bog down courts in matters that, because of their nature or their volume, were not suited to the judicial process (see LRCC, 1980: 35-6; Vandervort, 1979: 19-21; Slatter, 1982: Chap. 2; Dussault and Borgeat, 1984: 134-6).

Independent administrative agencies, as a group, carry out many activities. In this Report, we focus primarily on one. We have chosen to call it statutory decision making.

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1. Independent administrative agencies exist in some form in many other countries. The British Civil Aviation Authority is an example (see Craig, 1983: 120-3). So is the Australian Broadcasting Tribunal (see Administrative Review Council, 1982: 9-15). Even countries which have a heavily centralized form of government and a system of administrative courts have reverted to some form of independent agencies (see Sabourin, 1983).

By this, we mean the exercise of state authority, given by statute, to determine unilaterally the existence and scope of private rights[2] or obligations. Taking this somewhat limited legal view of a "decision", we have excluded from our consideration:[3]

- the exercise of the royal prerogative;
- internal management decisions made in the course of, but only incidental to, the exercise of statutory power;
- the exercise of a purely advisory function, such as that performed by this Commission or the Economic Council of Canada;
- decision making in the exercise of the rights and obligations the state shares with private citizens, such as the carrying out of a commercial undertaking through a Crown corporation;[4]
- the exercise of authority that is not directed at private interests (thus excluding the activities of entities such as the Canadian Commercial Corporation, which is the Government's contracting agency in dealing with foreign Governments).

Those activities are important. Most involve a form of public policy making; many have a noticeable effect on private rights and obligations. In many instances, agency decision making may be coloured by these other activities, in view of the diversity of functions that are sometimes entrusted to a single agency.[5] However, we think that the major concerns we address here arise most dramatically when the state and private interests interface in the context of a "decision".

In particular, it is in relation to decision making that the notion of "independence" encounters its most severe stress. Independent administrative agencies that exercise statutory decision-making powers are not easily situated within the Canadian political structure. Ours is a system of responsible government where executive functions are performed by ministers who must answer to Parliament for their actions. It is a system where "judicial functions" are exercised by judges, who are insulated by historical tradition from political

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2. We include in "rights" the concept of "legitimate expectation", which appears to have been coined first by Lord Denning in cases concerning natural justice. In *Schmidt*, [1969] 2 Ch. 149, he held:
   > [A]n administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say. (p. 170)

   Later on, in *Breen*, [1971] 2 Q.B. 175 (C.A.), the same theme appeared:
   > If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand. (p. 191)

   See also *Council of Civil Service Unions*, [1984] 3 W.L.R. 1174 (H.L.E.).

3. For the purposes of this Report, agencies that award grants also have been left aside. Although such a function may fall within our definition of decision making, not enough is known about the law of awarding grants to be able to fit it in the decision-making category for the purposes of this Report.

4. Some would identify this with the exercise by the state of its "dominium", i.e. the power that stems from ownership. This includes the power to use and dispose of resources and to spend money.

5. One of the strengths of the independent administrative agency model would appear to be its capacity for mixing functions, although some would suggest that doing so may at times adversely affect an agency's capacity to act as an independent decision maker unless special structures are adopted to separate roles (see Slatter, 1982: 118 and *infra*, p. 39).

influence.[6] Independent administrative agencies seem to fit rather awkwardly somewhere in between. For some observers, "independence" imports judicial attitudes, and a commitment to process that courts display in their quest for dispensing justice in individual cases. This is reinforced by concepts such as "quasi-judicial" function and "court of record", concepts that may be relevant to some agencies, but not to all. For other people, "independence" implies the exclusion of executive control over agencies, and of ministerial responsibility to Parliament for the decisions taken or policies pursued in the exercise of their mandates. For most, however, "independence" implies a vague, shifting status that defies any clear understanding of how agencies, as entities that are not located within the central governmental organization, should interact in a legal sense with other governmental institutions. Some are concerned that agencies, exercising the broad control over public and private interests that Parliament gives them, may not be held sufficiently accountable politically; others are concerned that political interference with an "independent" agency may compromise its ability to reconcile those interests, and contradict the very reasons that motivate resort to this model. Politicians, in particular, appear to be torn between two poles, insisting on the benefits of independent extradepartmental decision making, while looking for ways to influence it. We think that this lack of consensus about role and legal status has had a significant effect on the ability of agencies to perform the functions Parliament entrusts to them.

This dilemma is complicated by the fact that agency decision making is multifunctional. Agencies are not "quasi-courts".[7] Their authority to decide usually involves some regulatory objective, however remote. Appendix A illustrates the range of decision makers we see as falling within this broad category. This list draws together agencies whose authority to "decide" differs significantly and carries varying degrees of responsibility for policy formulation. Although we use shorthand references to "regulatory" and "adjudicative" agencies, we recognize that these terms have neither a precise nor a commonly

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6. According to Blackstone:

> ... [T]he public liberty ... cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law .... Were it joined with the executive, this union might soon be an overbalance for the legislative .... Nothing therefore is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. (Holdsworth, 1938: 417)

And according to Holdsworth:

> The independence of the judges is and always must be the best of all securities for the stability of a state for four connected reasons: First because it ensures that the judges, to whom the duty of defining and regulating the powers and duties of the persons and bodies exercising governmental functions is entrusted, carry out this important duty impartially. Secondly, because, as against those persons and bodies, it guarantees the liberties of the subject. Thirdly, because it creates a law abiding habit in the nation. Fourthly, because it grounds the authority of the state upon the rule of law. (p. 644)

See also Roman, 1978: 68. This article analyses Canada's position against the U.S. and the U.K. It emerges that we lie somewhere between the two extremes. The analysis was undertaken before the adoption of the *Canadian Charter of Rights and Freedoms*, which may have moved us closer to the U.S. position.

7. This was the case in England in 1957. The Committee on Administrative Tribunals ..., 1957: para. 40, considered that "tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration". This has not changed significantly, as the Council on Tribunals still considers itself to be the custodian of the Committee Report.

accepted meaning.[8] There is, nonetheless, a widespread tendency to dichotomize administrative process on these lines, to reflect the fact that some agencies are more deeply involved than others in influencing social and economic policy. There are strongly held views, particularly within the agencies, that each class requires discrete treatment. While we are sensitive to those opinions — at various points of this Report we respond positively to them — we think there is something to be said for viewing administrative decision making as a continuum, rather than as a composite of overlapping categories. There are, we believe, issues of common concern to all independent administrative agencies that warrant this more generalized approach.

Our list also contains agencies having varying degrees of independence. In some cases the authority "to decide" comes perilously close to a purely advisory function, which we earlier excluded from our definition of statutory decision making. However, an *effective* power to decide is sometimes subsumed in a decision that is "subject to executive approval", or even in a recommendatory function. We view some agencies making these kinds of "decisions" as independent, notwithstanding executive control.[9] For us, the fact that Parliament chooses to place a responsibility to make decisions outside the departmental structure creates public expectations of some measure of independence commanding attention to the concerns discussed in this Report.

In outlining a framework for statutory decision making, we project a mixture of socio-legal values drawn from Canadian political traditions and aspirations, contemporary approaches to public administration, existing doctrines of administrative law, and constitutional tenets. We believe the processes through which independent administrative agencies make decisions should reflect an appropriate blend of the following values (see LRCC, 1980: 13-5):

> *Accountability*: Having to answer for the exercise of what is essentially governmental authority to affect public and private interests. The rule of law demands that governmental authority not be exercised arbitrarily, and that agencies account, sometimes

8. The Economic Council of Canada defined regulation as "the imposition of constraints, backed by government authority, that are intended to modify economic behaviour of individuals in the private sector significantly" (see Economic Council of Canada, 1979: xi). Agencies which make regulatory decisions usually affect whole industries or significant portions thereof. They choose among competing interests and have discretion to alter the way in which criteria will be applied in any one instance. The issues they are to tackle may be resolved in accordance with rules or criteria that are defined during the decision-making process. Generally, the legislative mandate of what are popularly called "regulatory agencies" will require them to have a fairly large infrastructure in order to carry out research, administrative and supervisory tasks. Such familiar bodies as the CRTC, the National Energy Board, the Canadian Transport Commission and the Atomic Energy Control Board are prominent examples.
   On the other hand, what are popularly regarded as "adjudicative decisions" involve much less attention to public policy. Agencies that exercise this as a primary function often are more court-like in structure and operation than those that exercise regulatory functions. They tend to apply pre-imposed statutory criteria or rules to specific facts in individual cases. They decide which rules apply, interpret these rules, and may, under the rules, have a certain amount of discretion as to the particular result. But they are primarily expected to apply the rules within a narrowly circumscribed area of responsibility, and not to concern themselves with the elaboration of broad policy. Examples of such agencies are the Immigration Appeal Board, the Pension Appeals Board, and the Canada Labour Relations Board.

9. We recognize that some "advisory" agencies are, in fact, engaged in decision making. This explains our inclusion for consideration of such an apparently recommendatory body as the Foreign Investment Review Agency.

within a political framework, sometimes within a legal one, and often within both, for the decisions they make and for the policies they pursue as decision makers.

Authoritativeness: Making decisions that are accorded full recognition. Where authority is ostensibly given to an agency to decide a matter, those who deal with the agency are entitled to have the decision made by the agency, not by a politician, judge or other decision maker.

Comprehensibility: Making the administrative process as understandable as possible to those whom it affects. Interested persons must know whom to address, about what matters, and how to address them.

Effectiveness, Economy and Efficiency: "Getting the job done" without wasting human and material resources. Administration can be a drain on both public and private resources. It demands constant attentiveness to new and better ways of doing things.

Fairness: According appropriate recognition to the interests that may be affected by agency decisions. Without fairness there will be neither the trust and credibility that lend integrity to a process, nor the co-operation that is essential if it is to be efficient.

Integrity: Operating in a manner that is true to the objectives laid down for the agency; having a full commitment to its purposes. An agency must be sufficiently free of background pressures to project competence and confidence in carrying out its duties. The administrative process needs both the self-respect of the agencies and the respect of those with whom they deal.

Openness: Making the administrative process accessible to those it affects, and providing a window through which it can be seen. There must be openness if other values are to be adequately realized. For instance, those who are affected by decisions look to openness as a further guarantee of fairness and accountability.

Principled Decision Making: Rationally correlating the information the agency has, the interests of which it is aware, and the objectives, policies and criteria that are to guide its decisions.

These values tend to overlap and reinforce each other. In some instances, to stress one may underplay another. In any given context some may be more important to observe than others. While the appropriate blend necessitates an element of political choice, these values should all be accommodated within the overall legal and operational framework for agency decision making. It must be emphasized that agencies do not make decisions merely to resolve private disputes. They must also advance the public interest, having due regard for private interests, in a way that will promote optimal voluntary compliance with the policy that is adopted. The values reflected in a process have a significant bearing on whether or not that goal is achieved.

It is with this in mind that this Report approaches several contemporary administrative law issues. In Chapter Two, for example, we discuss how law allows other governmental institutions to influence formally the objectives, policies and criteria that guide agency decision making. We express concern about the effect that both executive and judicial intervention can have on the *authoritativeness* and *integrity* of an agency's decision-making process, and we suggest a more autonomous role for agencies in formulating the policies that are to guide their decisions. In recommending that both Cabinet and the courts play a modified policy role, we ask that Parliament itself ensure, more than it does now, that agencies are *accountable* for the policies they follow. We develop these themes in discussing issues concerning the use of regulations, Cabinet policy directions, agency policy statements, political "appeals" and "approvals", and "privative clauses".

In Chapter Three we present an outline of procedural reform. We stress the importance of common legislated standards as the basis of a more rational procedural framework. We suggest that such a framework can help to make independent administrative agencies more *accountable* for the authority they exercise, as well as to facilitate the balancing of *fairness* with *effectiveness, economy and efficiency*. We outline a procedural rule-making process that would help to ensure that procedural concepts like "notice", "hearing" and "access to information" are accommodated to the special needs of agencies, so as to increase their capacity to get the job done, but that would also help to ensure appropriate respect for process[10] values such as *fairness* and *openness*. Finally, we promote an approach to procedure that would minimize unnecessary diversity in the rules that agencies adopt, thus improving the *comprehensibility* of the system.

In Chapter Four we touch briefly upon related, wider concerns. Chapters Two and Three provide only a framework for reform, the impact of which is necessarily affected by matters like appointments, tenure, budget and organization. These have a significant bearing on the achievement level of an agency, and must be addressed in any overall program of reform. These are matters on which we make no specific recommendations, but invite serious attention.

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10. The concepts of process and procedure must be distinguished. Process is a notion that describes all the steps that are taken through various stages over a period of time and that may be identifiable as rule making, adjudication or investigation only at certain points (see Law Reform Commission of British Columbia, 1974: 8; also Issalys, 1979: 4; Wiener, 1975: 15). Processes also "refer to the changing dynamics which arise when decision makers are required to deal with uncertainty and with a changing environment" (see Doern and Phidd, 1983: 34, 95, 567). However, process is sometimes confused with procedure. See, for example, the former *Anti-dumping Act*, R.S.C. 1970, c. A-15, Part II, which dealt with process under the title *Procedure*, and Part III which dealt with rules of procedure.
In comparison, procedure concerns the ways and techniques of doing something, the applicable rules at each stage (see Issalys, 1979: 4; Wiener, 1975: 15). However, procedure can be seen from a wider point of view in which it subsumes all the phases of the process, if the notion is understood as being one that comprehends a vast body of rules, as in civil procedural law, dealing with agencies of all categories, the legal profession as a whole and the administration of justice, the latter including rules of practice, the proceedings, the means of appeal or of any other form of relief, the execution of judgments and all the other stages of the proceedings (see *Halsbury's Laws of England*, 1982: Practice and Procedure, para. 1). To sum up, process is all the steps that are taken over a period of time in dealing with a claim or issue whereas procedure concerns all the rules applicable to each step and to the ways of operating.

This Report hopes to offer a systemic view of the administrative process. One of the purposes we seek to achieve is to alter the perspective from which administration is often perceived by lawyers, that of judicial review. To do this, we have chosen to avoid emphasizing inadequacies that may surface from time to time in specific cases. Focussing on the point where the normal functioning of the system is disrupted does not do justice to the overall performance of administrative agencies (see Angus, 1974: 179-80; Dussault and Borgeat, 1984: vii-viii). For one thing, it tends to perpetuate assumptions that the way courts do business is the only way when it comes to making decisions that affect private interests. Rather, we approach reform on the assumption that the administrative system works reasonably well, despite its need for some improvement in order to reinforce certain values that we think are presently given insufficient weight.

CHAPTER TWO

A Policy Framework

The policy that guides agency decisions is developed and expressed not only in day-to-day decisions, but also through formal processes controlled by other governmental institutions with which agencies continuously interact. For example, it is Parliament which gives an agency its source of authority and initial guidance in its statutory mandate. In constituting the agency, Parliament specifies certain objectives that must be met. Although there is general agreement that an agency should be broadly accountable to Parliament for carrying out its mandate, there is uncertainty as to how that principle should be reflected in practice. Agencies presently report periodically to Parliament, are subject to parliamentary authority for their spending, and are available to provide information to parliamentary committees from time to time. Still, many observers, including parliamentarians, feel that Parliament should have a more direct and effective influence on how agencies interpret and execute their mandate. They question whether other mechanisms may be appropriate to strengthen the role of Parliament *vis-à-vis* the agencies, and whether existing ones can or should be modified.

As we have already noted, the label "independent administrative agency" implies a degree of independence from the executive. Many agencies have little or no direct contact with it apart from appointments, budgets and annual reporting. This is particularly true of those agencies that exercise mainly adjudicative responsibilities, and even more so if they operate in the manner of a court. On the other hand, agencies whose mandates include policy making of a politically sensitive nature may sometimes find themselves confronting Cabinet and government departments on particular issues. Agencies that have the responsibility of regulating important economic activities are prime examples. Here, the temptation may be great for the executive to try to influence overtly (see footnote 79) or covertly[11] the actions of the agency.

Executive intervention can appear quite innocuous: Cabinet or a minister may simply adopt or approve regulations which flesh out the agency's statutory mandate. Or it can be more pointed: executive influence is sometimes exercised through directions or review, or by giving final approval to certain decisions. Many may characterize this involvement

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11. See LRCC, 1980: 89-91, especially p. 90 which refers to the "confidential" message from the former Minister of Communications, Jeanne Sauvé, to the then Chairman of the CRTC, Harry Boyle concerning membership in the Association of Telesat Canada sent during the course of CRTC proceedings. We recommended (see LRCC, 1980: Rec. 4.14) that such *ex parte* communications pertaining to particular proceedings be put on the record.

as direct political interference, because it frequently signals *ad hoc*, *ex post facto* policy formulation affecting specific agency decisions. Still, many disagree as to whether and when there should be formal executive intervention in the work of an independent administrative agency, and whether and how this can occur without compromising its "independence".

Finally, courts can influence the policy to which agencies adhere in their decisions. The Federal Court of Canada may, at the behest of a person aggrieved, review an agency's decision to determine whether it has exceeded its statutory powers, erred in law or failed to observe standards of fairness in making a decision. It is also through judicial review that the *Canadian Charter of Rights and Freedoms* has begun to influence administrative decision making.[12] Although the primary role of judicial review is to police the limits of legal authority and not to substitute the court's view of the merits of a decision, a court's authority to interpret the law can often have important policy implications, not only with respect to that decision but on the broader application of the agency's mandate.

The way in which authority is exercised within the wider institutional setting we have just described influences significantly an agency's actions and its effectiveness, as well as how it is perceived by itself, by government officials and by those it directly affects. To develop that proposition, we explore a number of processes in which policy is generated to direct or guide agencies when they make decisions. These processes may involve legislation, supervision or review. Different institutions play different roles in them. Some processes occur more commonly before a decision is made, while some result in the development of policy after the agency has acted. We have chosen not to resort to any strict categorization. Our interest lies primarily in the fact that all these processes result in normative statements which are meant to influence agency decision making. Moving through the primary and subordinate legislative processes to agency rule making, and from there to parliamentary, executive and judicial review, we make numerous observations and recommendations that are designed to promote a framework that will allow the appropriate policy to develop, while also supporting the integrity and authoritativeness that agency decision making demands.

I. Primary Legislative Process

It is an axiom of our system of parliamentary democracy that an agency's activities must be founded on parliamentary authority. This authority is expressed in the statute that sets up and gives initial instructions to the agency, sometimes referred to as the agency's "constituent Act". These instructions can be quite specific; this is frequently

12. Provincial supreme courts have some jurisdiction over federal agencies when the constitutional validity of a law is at issue (see *Jabour*, [1982] 2 S.C.R. 307). Although in principle the Charter has not changed this, it is likely in practice that provincial courts will call federal agencies to account on Charter issues much more frequently than previously.

so where the agency is given adjudicative functions. For other functions, particularly those of a regulatory nature, the initial instructions to an agency may be so broad as to amount to merely requiring it to decide matters "in the public interest".

A measure of vagueness in the expression of statutory mandates is understandable and, to an extent, inevitable. It would be unrealistic and impractical, as well as antithetical to the purpose of creating certain agencies, to expect Parliament to resolve in advance the very issues the agency is created to address. As well, where these issues are highly politicized, a measure of generality in the instructions to the agency may be unavoidable. It may be the price to be paid to ensure the passing of legislation.[13]

Nonetheless, an obscure and confusing mandate should be avoided wherever possible. Statutory language should not be understandable only by reference to its historical and political context. Working Paper 25 (see LRCC, 1980: 54-6) criticized broad mandates such as section 3 of the *National Transportation Act*, which requires the Canadian Transport Commission to serve at the same time the competitive requirements of commercial enterprise and the often conflicting dictates of public necessity, such as the balancing of regional interests through rate regulation and subsidy (see also Janisch, 1978: 10-9). Broad mandates can give rise to executive, judicial and public confusion about agency goals and priorities. Those which the agency sets may not be in accord with the earlier assumptions of either Parliament or the executive. This may contribute, in the long run, to pressures now being experienced for greater directive authority in Cabinet with respect to agency policy making (see section II.B of this Report).

Confusion about agency objectives can also bring about operational and compliance problems: it can allow variations as to when and how rules should be invoked, lead to uneven enforcement, provoke general skepticism as to agency methods and objectives, and encourage informal compliance arrangements, which are at best uncertain in their status. Section 3 of the *Broadcasting Act*, for example, charges the CRTC with balancing diverse social, economic, cultural and political values. Yet the Act contains no definition of Canadian programming, the main television content element regulated by the CRTC. Until recently, the agency itself took no measures to deal with this question on the broad policy level. This lack of "objective" standards has produced uncertainty on the part of licensees and beneficiaries, opportunities for obfuscation by licensees and a reluctance on the part of the CRTC to invoke available sanctions.[14]

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13. Some speak of this reality in terms of "constructive ambiguities" (see Hammond, 1982: 329). This article is central to the understanding of our work in this section and in the section on agency statements of policy.

14. For a full discussion of this question see Clifford, 1983: 491 *et seq.*, 508 *et seq.* The CRTC has recently undergone a process of public consultation and review for the purposes of defining, for its regulatory use, Canadian content in television. The result was the adoption of criteria for the recognition of Canadian programs (see "CRTC — Public Notice 1984-94, Recognition for Canadian Programs", *Canada Gazette, Part I*, vol. 118, no. 17 (April 28, 1984), p. 3493; also Hammond, 1982: 353-4 who expresses similar concern about ill-defined broadcasting policy).

There is an accountability concern as well. Confusion over objectives can make it difficult for Parliament, the executive and the interested public to evaluate how effectively the agency operates. Uncertain objectives also invite litigation, and provide courts with little assistance in reviewing agency action. One commentator suggested, as a test, that statutory objectives are tight enough only if they afford sufficient particularity to allow someone to disagree.

It is important, therefore, that *whenever Parliament creates an agency or alters the scope of its responsibilities, it make every effort to state as clearly as possible, in plain and unambiguous language, the broad objectives the agency is to pursue* (see LRCC, 1980: Rec. 3.3, 3.12; Royal Commission ..., 1979: Rec. 18.3; Slatter, 1982: 113). The constituent Act is the legal linchpin for the entire agency operation and should attempt to provide a coherent framework for the agency's activities. It must also be durable. If not, it will pose an obstacle to the agency while a protracted amendment process unfolds. A draft bill may be kept secret until introduced in Parliament, offering little opportunity for early public participation in policy development. Although recent initiatives to give advance notice of proposed legislative changes are salutary and tend to minimize some of these disadvantages, the requirements of the parliamentary system make the process too formal and rigid to accommodate every proposal for policy change (see Hammond, 1982: 329).

This is not to say, however, that the description of the agency mandate in legislation should be exhaustive. Legislation could not possibly accommodate adequately the subtleties of the issues many agencies must ultimately face. Only ongoing agency activity can bring to light certain questions to be addressed at the policy level. To be overly specific could stifle an agency and saddle it with certain "inherent" contradictions and ambiguities. It could limit its capacity to adapt to changing circumstances.

Accordingly, *Parliament should leave sufficient scope for the development of complementary administrative policy as the agency gains experience. What the statute should seek to ensure is that this more detailed articulation of the legislated "plan of action" evolves in an orderly and open fashion.* In this respect, we feel less strongly than we did about the importance of amending the constituent Act to reflect the evolution of an agency's mandate (see LRCC, 1980: Rec. 3.13), as long as policy is developed consistently with the statute, is elaborated clearly through a subordinate legislative process and through agency rule making, and as long as there are appropriate accountability mechanisms to ensure that the policy is acceptable to Parliament, from which the initial authority derives. This we shall come back to in our discussion of subordinate legislation and agency rule making. The notion of periodic review of constituent Acts is something we do still favour, however, to ensure that there are no unacceptable gaps that have been created between stated and applied policy through agency or judicial interpretation over the course of time.

We also think that *parliamentary assent is essential where action is required to redefine an agency's role and duties.* Under existing law, for example, Cabinet has the authority pursuant to section 2 of the *Public Service Rearrangement and Transfer of*

Duties Act to transfer duties to and from agencies. While the authority does not seem to have been abused, and although we concede that it might prove impractical to require legislative amendments for minor transfers, we believe that at the very least *parliamentary approval should be required through an affirmative resolution procedure whenever this authority is used.* Any measure that would lessen this level of formality would not be in keeping with the seriousness of the interference that is entailed in such a transfer.[15]

Finally, we believe that *Parliament should try to adopt a consistent format wherever broadly analogous objectives are contemplated for different agencies.* Agency constituent Acts do serve as models for the creation of other agencies, but incongruities arise owing to a variety of factors: legislation is prepared at different times, by different drafters, on the advice of different advisers, and within different political contexts. Achieving a more systematic approach to the preparation of agency legislation is admittedly more difficult than it may appear at first blush. Nevertheless, the early involvement of legislative drafters in the planning process for agencies and the more widespread use of checklists and model provisions would help to improve the overall comprehensibility of constituent Acts (see LRCC, 1980: Rec. 3.1, 3.4, 3.5; Slatter, 1982: 112-3).

II. Subordinate Legislative Process

When Parliament grants in primary legislation the power to enact subordinate legislation, it delegates authority to determine some of the policies that will apply to an area of administrative activity. For this reason, the very concept of subordinate legislation has at times been roundly criticized. Some have perceived it as the last blow to parliamentary democracy and as foreshadowing Government by decree (see Hewart, 1929: 14; Allen, 1931; Tellier, 1982; Tellier, 1983). These views are not widely shared today. For reasons we have already given, Parliament cannot address all the relevant issues in sufficient detail to dispense with intermediate measures between the statute book and individualized decision making. Moreover, any legislative process, including the making of subordinate legislation, carries with it certain benefits. Not the least of these is that it can foster equality of treatment in similar circumstances and can give interested persons a better insight into the motivations of the decision maker. Properly used, then, subordinate legislation can help promote such values as accountability, comprehensibility and fairness.

Moreover, if used creatively, the subordinate legislative process can provide those who seek to influence the choice of decisional criteria the opportunity to participate at the policy development stage. This can be seen in recent experiences arising out of the

15. Thus, powers such as those in subsections 3.1(1) and 3(4) of Bill C-33, 1977, would find little sympathy with us. Indeed, we doubt that any transfer powers other than those contained in the *Public Service Rearrangement and Transfer of Duties Act* would ever be needed. The Royal Commission on Financial Management and Accountability (1979: Rec. 18.8) is in accordance with our view.

publication of a regulatory agenda. Four independent administrative agencies have participated in this program on a voluntary basis.[16] Agencies are prepared to discuss with interested persons certain aspects of proposed regulations and to present options rather than a "take it or leave it" package deal. Indeed, the very existence of the regulatory agenda seems to have raised expectations about participation and encouraged regulation makers to take into consideration the opinions of the interested public.

This initiative adds to concerted efforts made over the last decade to promote notice and comment procedures. A score of statutes[17] now allows for this form of participation in regulation making. In addition, some decision makers initiate a notice and comment procedure even when there is no statutory requirement to do so.[18]

Working Paper 25 (see LRCC, 1980: Rec. 5.10) strongly supported this form of participation. We are greatly encouraged by the efforts that have been made since then. To us, the scope for direct participation within the subordinate legislative process appears to be wider than within the parliamentary process, and we think it is important that agencies themselves assume a prime responsibility for this. *The participation of interested persons broadens the perspective from which agencies consider policy questions having important implications for both public and private interests. By allowing for the testing of ideas, it enhances both fairness and efficiency in the administrative process. It promotes accountability: the very publicity of any process is a form of control over it. Finally, the*

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16. The *Regulatory Agenda*, begun in May 1983 and to be published twice yearly in May and November as a supplement to the *Canada Gazette*, contains proposed or contemplated regulatory initiatives of several government departments and the Atomic Energy Control Board, the CRTC, the Canadian Transport Commission and the National Energy Board. (The National Energy Board also publishes quarterly agendas separately.) The Agenda indicates prospective regulatory initiatives, policy statements and amendments to, or initiatives for, draft regulations. Identified with each initiative is a short statement of the problem being addressed, the legal authority for the contemplated initiative, information relative to the development and availability of any socio-economic impact analysis of the proposal, and a departmental contact person from whom further information might be obtained. Although the agencies participate voluntarily, the contributing government departments are required to do so (see *Regulatory Agenda*, Supplement to *Canada Gazette, Part I* (November 19, 1983), p. 4). Similar recommendations were made by the Special Committee on Regulatory Reform (see Canada, House of Commons, ..., 1980: 6-7; Economic Council of Canada, 1979: 73-7; 1981: 133).

17. See *Banks and Banking Law Revision Act, 1980*, s. 315(3); *Broadcasting Act*, s. 16(2); *Canada Oil and Gas Act*, ss. 20(2), 54(2); *Canadian Aviation Safety Board Act*, s. 30(3); *Consumer Packaging and Labelling Act*, s. 19; *Canada Business Corporations Act*, s. 254(2); *Electricity and Gas Inspection Act*, s. 28(2); *Canadian Human Rights Act*, s. 19.1(3); *Motor Vehicle Fuel Consumption Standards Act*, s. 4(1); *Motor Vehicle Safety Act*, s. 9; *Motor Vehicle Tire Safety Act*, s. 9; *Municipal Grants Act, 1980*, s. 8(3); *Oil and Gas Production and Conservation Act*, s. 12.1(1); *Canada Post Corporation Act*, s. 17(3); *Radiation Emitting Devices Act*, s. 11(2); *Safe Containers Convention Act*, s. 3(3); *Shipping Conferences Exemption Act, 1979*, s. 16(3); *Territorial Lands Act*, s. 19.1(*b*); *Transportation of Dangerous Goods Act*, s. 22(1); *Weights and Measures Act*, s. 10.1(1).
The introduction of socio-economic impact analyses in the area of "health, safety and fairness" should also be noted (see Canada, Parliament, ..., 1984: para. 37).

18. One is the Atomic Energy Control Board which, in 1981, began to issue "consultative documents" containing proposals for new regulations, safety criteria, etc. These are mailed to interested parties who are invited to comment on the proposed initiatives. Normally, the Board expects only written replies, but it has held meetings when warranted. Thus, in February 1984, open and closed meetings were held regarding proposed Physical Security Regulations. The National Energy Board and the Canadian Human Rights Commission are also known to us to follow a similar practice.

participation of public and private interests can enhance an agency's sense of legitimacy and its initiative. Too much emphasis is put today on elected accountability as the sole source of legitimacy for public policy making. This attitude, carried to its extreme, may stifle an agency's policy-making initiatives. For this reason, it needs to be counterbalanced; offering a reasonable opportunity for interested persons to participate in the subordinate legislative process is a means of achieving this goal (see LRCC, 1980: Rec. 5.1).

To be "reasonable", the opportunity to participate should be genuine, commensurate with the importance of the issue, open, equally available to competing interests,[19] *and sufficiently early in the process to be meaningful, without crippling the agency in the fulfilment of its overall objectives by introducing unreasonable delay*. Ways must be found to offset the cost of participation to interested persons where this is necessary in order to balance the opportunities extended. Some of the options which merit consideration include: direct government funding; cost awards, as are sometimes made by the CRTC in the telecommunications sector; economic support to legal service groups; and government representation of constituent interests by means of public advocacy officers. Past experience shows that none of these methods is without its problems. However, the importance of the principle warrants continued efforts by the Government to assist agencies in working out approaches to meet the special circumstances with which each must deal (see LRCC, 1980: 105-9).

The proliferation of government rules and regulations has been a matter of general concern over the past several years. Nevertheless, we believe that in the context of statutory decision making, subordinate legislative authority has probably been underutilized. The subordinate legislative process can be more dynamic, more responsive, more open to direct participation and more efficient than the parliamentary process. It can allow for the expression in statute of durable objectives, while leaving enough flexibility for an administrative regime to adapt to new circumstances. It can help Parliament to concentrate on essentials and leave details to others. It circumvents the risk of the whole policy debate on a statute being reopened in the House where a particular clause is in need of amendment. It can avoid needless repetition of policy arguments in individual cases. All this remains true whether the general political philosophy of the time is "interventionist" or calls for a more "hands-off" approach on the part of Government. Finally, all this need not represent an abdication of Parliament's powers, as we shall see when we discuss parliamentary review.

The authority to make subordinate legislation may not prove useful in all contexts; indeed, for some specialized adjudicative functions the concept is foreign. But where an independent administrative agency is given a mandate that mixes policy elaboration with a decision-making role, subordinate legislation is a useful means of structuring and communicating that policy.

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19. Recently, the Canada Post Corporation decided in practice upon the definition of "letter" before the notice and comment process, provided for by statute, was undertaken. Some prior consultation was done with some major users of the postal system, but not with all. It is important that the notice and comment process not become ceremonial, but have some practical significance.

A. Regulations

For the most part, administrative agencies enjoy little independence in the making of regulations. While the Canada Labour Relations Board, the Public Service Staff Relations Board, the Canadian Radio-television and Telecommunications Commission and the Canadian Transport Commission have unfettered authority to make certain regulations,[20] the usual situation is that, rules of procedure aside, regulations affecting agency activities are either made or approved by Cabinet or a minister. Frequently, however, regulations are developed within the agencies themselves, and here the role of the executive is often a formal one (see Slatter, 1982: 83).

Under the *Statutory Instruments Act*, regulations must be filed in advance with the Clerk of the Privy Council who, with the help of the Deputy Minister of Justice, scrutinizes them for *vires*, unusual use of authority, undue encroachment on the rights of individuals, and quality of drafting (subsection 3(2)). Regulations are subsequently registered and published (sections 6 and 11). Moreover, all statutory instruments stand permanently referred to the Standing Joint Committee on Regulations and Other Statutory Instruments for scrutiny with respect to quality of drafting, *vires*, human rights, and, to some extent, merits.[21]

We support the general thrust of the existing regime. Some difficulties do arise, however. Greater agency autonomy in regulation making could help to resolve them. It could reduce the duplication of effort that seems to exist, as well as alleviate a certain irritation frequently expressed within agencies, particularly those larger ones to whom statutes give the authority to adopt regulations on their own. They resent the delays and interferences that sometimes occur in having draft regulations grind slowly through the same overburdened and understaffed Privy Council Office that would have been involved had their regulation-making power not been autonomous. There is a perception that the screening process is inconsistent with the specialized mandates conferred upon agencies by Parliament, that those who work on regulations within that office are insufficiently expert in the niceties of regulatory undertakings, and that even though the major emphasis is on form, this can have substantive implications for the regulatory process.

While these difficulties may not reflect a fundamental breakdown of the existing system, there is a case for exempting from the preliminary screening procedures agency-made regulations that are submitted to a notice and comment procedure prior to their

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20. *Canada Labour Code*, s. 117; *Public Service Staff Relations Act*, s. 19; *Broadcasting Act*, s. 16(1)(*b*); *Aeronautics Act*, s. 14; *National Transportation Act*, ss. 26, 42, 46; *Railway Act*, ss. 91, 94, 110, 116, 119, 189, 193, 206, 221, 225, 238, 239, 249, 262, 268, 270, 278, 291, 294, 296, 306, 310, 320, 322, 330, 339, 347.

21. *Statutory Instruments Act*, s. 26. Strictly speaking, the Joint Committee does not scrutinize for merits or policy (see Canada, Parliament, ..., 1984: para. 19; Canada, House of Commons, ..., 1980: 24). However, depending upon one's point of view, scrutiny under the Committee's "unusual or unexpected use of power" criterion might be considered an inquiry into merits or policy. For a discussion of the importance of scrutinizing delegated legislation and a description of the process in the U.K., see Wade and Phillips, 1977: 570-9.

adoption. It is not unreasonable to expect that those who will be most directly affected by proposed regulations will act as scrutineers of the minimum standards to which regulations should conform. To require agencies both to undergo extensive pre-promulgation consultation and to submit to central agency screening seems unduly to complicate and protract the process of regulation making, particularly when many of the criteria applied in the preliminary screening process are reapplied in the post-registration review undertaken by the Joint Committee, as well as by the Minister of Justice under section 3 of the *Canadian Bill of Rights*. To exempt these regulations might result in less uniformity of language and format. Although this is regrettable, particularly in view of what we have to say about the importance of rationalizing statutory mandates and procedures (see pp. 47 to 51 of this Report), the current bottle-neck seems to cause more difficulties than any variance in language or presentation may raise.[22] If it proves to be impossible to have an effective yet expeditious central screening process, the approach we recommend probably is an appropriate compromise. It would not only placate those agencies that feel frustrated in exercising their regulation-making authority; it would free the drafting branch of the Privy Council Office to concentrate its limited resources on government regulations.

We think that *a pilot project could be undertaken to test this hypothesis. Agency regulations that are submitted to a public notice and comment procedure could be exempted from those requirements of the* Statutory Instruments Act *that precede registration and publication*. While the *Statutory Instruments Act* presently allows for the exemption of certain regulations from the process it sets out in the Act (paragraphs 27(*a*) and (*b*)), the existing categories may have to be broadened to accommodate such a project.

The problem just discussed raises, however, a larger question: Should more agencies be given regulation-making autonomy? Frequently agencies are expected to initiate a request for regulations, to prepare and consult on them, yet are not formally empowered to make them. In part this seems to reflect the notion that our constitutional traditions require all political responsibility to Parliament to be channelled through the executive. In part it has to do with the political sensitivity of certain issues that may have important economic implications or substantial interministerial aspects, affect the protection of the public or touch upon fundamental human rights.

We do not presume to offer criteria for determining when a policy matter should be assigned to an independent administrative agency. We do think however that where the enabling statute mixes policy determination with decision making, there are at least three reasons for leaving policy determination to the agency. First, routine executive involvement in policy may compromise in some respects the integrity of decisions (see section V.B of this Report). Second, if Parliament sees direct participation as an important aspect of agency decision making, the failure to accord authoritativeness to the agency in its related policy role may have a detrimental effect upon the quality of that participation.

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22. As an aside, it might be said that the civil law world does not even maintain a specialist corps of statutory drafters; and no other nation in the common law world has a corps of central agency regulatory drafters as does Canada.

If the real decision maker resides elsewhere, interested persons may be dissuaded from making the effort to participate. And third, the regulation may be so technical, and of such peripheral interest to Cabinet, that to deal with it on a Cabinet agenda could be an inefficient use of its time.

There may be overriding considerations that warrant retaining tighter political control of regulation making. Whether Cabinet should make a regulation, approve it, have residual authority to countermand it, or have no authority whatsoever to affect the process remain questions of political judgment. There cannot be a hard and fast rule. We do think, however, that Parliament should resist taking the firm position that the executive must necessarily supervise all subordinate legislation. Indeed, we think that the starting point should be reversed. *Where an agency is given the responsibility for developing, through regulations, some or all of the policies that are to guide its decisions, it should be empowered to act without executive approval* (see *contra*, Royal Commission ..., 1979: Rec. 18.4). This would not necessarily imply the total absence of government control (see section II.B of this Report). As well, a power of revocation similar to the one provided in section 8 of the *Statutory Instruments Act* could be contemplated.

As a general rule, we think that it is Parliament, from which the power to make regulations emanates, which should oversee them. It is to Parliament that agencies should account for the exercise of regulatory authority. To help achieve this, *agency regulations should stand permanently referred, as they do presently, to the Standing Joint Committee on Regulations and Other Statutory Instruments*, of whose work we are highly supportive.[23]

We would, however, go further. While the Committee has been able, through negotiation, to ensure that statutory instruments conform to the broad purposes of the *Statutory Instruments Act*, we think that *there is both a symbolic and a functional purpose in providing for a general procedure that would allow Parliament to disallow subordinate legislation without passing a legislative amendment*. Symbolically, it would reinforce the notion that, subject to the Constitution, the giver of legislative authority is the supreme arbiter of the validity of its use. This is now obscured by the fact that Parliament has delegated such wide supervisory authority to the executive. Functionally, Parliament is a suitable forum for the discussion of the use of legislative power and, through the politics of reason or embarrassment, it can promote compliance with the rules it has laid down for making statutory instruments. Several statutes open to Parliament "the possibility to

23. It should be noted in passing that the definition of statutory instrument is overly technical and laden with extensive exceptions. Furthermore, it has been interpreted narrowly by the Department of Justice; this has resulted in the Joint Committee not being able to determine for itself whether it should examine a given instrument (see LRCC, 1980: 67-9; Canada, Parliament, ..., 1977: 48-9). Proposals have been made for the establishment of only one class of statutory instrument and for the abolition of the definition of regulation contained in the *Statutory Instruments Act*. Furthermore, recommendations have been made to allow for scrutiny of all subordinate legislation by widening the definition of statutory instrument (see Canada, Parliament, ..., 1984: para. 57-61).

disallow a statutory instrument or to prevent its coming into or continuing in force by refusing to affirm it'' (see Canada, Parliament, ..., 1984: para. 22). To heighten the perception of accountability to Parliament for the making of subordinate legislation, we think that *this authority should be generalized by amending the* Statutory Instruments Act.[24]

The adoption of an appropriate procedure to implement this authority is a matter for Parliament itself, and we prefer to leave it to others more versed than ourselves in this area. We are chary of making any suggestions that would increase the already heavy strain on parliamentary time, or allow one party to manipulate House time at the expense of another. We are confident, however, that the rules of Parliament can be suitably adjusted to deal with such a disallowance process.[25]

B. Executive Policy Directions

There is a further class of subordinate legislation, referred to as ''policy directions'' or ''directives''.[26] By this, we mean instructions specifically authorized by statute to be

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24. Note that no Standing Order of the House provides for a disallowance process (see Slatter, 1982: 82-3). In Québec, the Vaugeois Committee (1983) was established to study the role of the National Assembly with respect to delegated legislation and to determine appropriate means to exercise that role. The Committee recognized that, *inter alia*, a disallowance process would have considerable persuasive effect on the sponsors of subordinate legislation, thereby encouraging them to conform with the expectations of the members of the Assembly (see Québec National Assembly, ..., 1983: 146 *et seq.*).
In Australia, parliamentarians have the power to disallow regulations by voting a motion revoking them when the Committee charged with supervising subordinate legislation has recommended in its report that they be disallowed and when the Committee has exhausted informal methods of persuasion. Any individual member of either House may put down a motion to disallow. The motion must be debated and voted on before the expiration of fifteen sitting days after notice has been given, failing which the regulation is deemed to have been disallowed (see Québec National Assembly, ..., 1983: 146-7).
In the United Kingdom it is quite common for the enabling Act to provide that an instrument shall be laid subject to the negative resolution procedure. Thus it is open for a member to move a prayer to annul the instrument within forty days of its being laid. A small number of instruments are required to be laid subject to an affirmative resolution of one or both Houses. If there is no requirement as to laying, a member who gets to know of the instrument can still set down a question to the responsible Minister or seek to raise the matter in debate. Motions to annul are rarely successful, but in 1972 the Immigration Rules were rejected because some Conservative backbenchers objected to giving preference to EEC nationals over citizens of ''old Commonwealth'' countries (see de Smith, 1981: 345-7).

25. The Study Committee of the Québec National Assembly recommended that a special committee report to Parliament within a prescribed period of time and, where negotiation with the regulation's sponsors was unsuccessful, the committee could recommend modification or disallowance (see Québec National Assembly, ..., 1983: 184-5). Motions for disallowance should be made on the basis of a negative report by at least five members from two parties, and, if not defeated within a prescribed period of time, the regulations should be ineffective. One obvious way in which such measures could be made more palatable would be if a rule were introduced requiring the party raising questions relating to an instrument to find the necessary parliamentary time. Another approach would be to refer the instrument to a specialized committee whose role it would be to filter motions for disallowance before the full House had to deal with them.

26. See the Table of Statutes, section on Regulations and Directives, for examples thereof.

issued by Cabinet or a minister[27] and issued in a formal instrument to bind the agency to the policy the Government intends to see followed on a given question.[28]

Under present law, binding policy directions can be issued to three of the agencies we have studied, the Atomic Energy Control Board, the Canadian Radio-television and Telecommunications Commission and, within a narrow range, the National Energy Board.[29] These are regulatory agencies whose broad statutory mandates are open to differing interpretations and to the exercise of considerable discretion. They operate in fields that are also occupied by government departments, a situation that can foster pressure for government influence with respect to policy development within the agencies.

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27. The *Energy Supplies Emergency Act, 1979*, s. 25 is apparently unique: it empowers the National Energy Board to give directions to the Canadian Transport Commission.

28. The concept of "directive" is one that remains undefined. Because of the lack of agreement as to the nature of the concept, opinions differ as to their legal status. Thus, at least four concepts need to be distinguished.
First, there is the informal statement of policy, whether issued by the Government or by the agency itself. Informal policy statements are expressions of purpose, but are not specifically authorized by statute and have no legally or internally binding effect. Nevertheless, they are of great relevance of the issues faced by some agencies, and are taken into account by them in making decisions when to do so is not inconsistent with their statutory mandates. Informal policy statements may appear in ministerial speeches, in announced government programs such as the recent "six and five" anti-inflation drive and the National Energy Program, or through a variety of other means.
Secondly, there are administrative "directives", that are internally binding but not justiciable. Their issuance need not be authorized by statute. Even when it is, they do not confer legally enforceable rights on third parties, notwithstanding that such parties may be adversely affected by non-compliance. For example, administrative "directives" used within the correctional system were held by the Supreme Court of Canada not to be legally enforceable by prisoners, even though the prisoners were directly affected by the failure of prison authorities to respect the "directives" (see *Martineau*, [1978] 1 S.C.R. 118). Administrative directions are used frequently to dictate administrative policy within the ranks of government departments, and are of importance within agencies to establish broad standards of administration (see also *Monty*, C.S. 84/08/28, no. 84-846 J.E.; Dussault and Borgeat, 1984: 417-31; Dussault, 1983).
Thirdly, would come the type of binding policy statements that we allude to later (see section III, Chapter Two of this Report). These are in the nature of self-imposed limitations on a discretion. They impose as such no fetters on private parties, but they do bind the decision maker: the courts will enforce agency compliance with them.
Finally, come the directions that this section of the Report is concerned with. They are more in the nature of regulations. They bind all concerned. The power to issue them exists only where provided by statute.

29. *Broadcasting Act*, s. 27; *Atomic Energy Control Act*, s. 7; *Northern Pipeline Act*, s. 22. Other agencies are also subject to executive direction. Two are the Agricultural Stabilization Board (*Agricultural Stabilization Act*, s. 4) and the Canadian Dairy Commission (*Canadian Dairy Commission Act*, s. 11). The *Canada Water Act*, s. 11(4), is apparently unique in conferring upon the Minister of Energy, Mines and Resources the power to give directions to any federal agency with respect to the implementation of any water quality management programme.
The Cabinet review/appeal process can, in some cases, be used in such a way that it makes enforceable "non-binding" statements of policy. A good example is the recent debate between Lloyd Axworthy, former Minister of Transport and the CTC concerning deregulation of airlines. The Minister took the view that enquiries held by the CTC were moving too slowly. He threatened to override the system by revising individual decisions at odds with his policy and to use the Cabinet's power to review CTC-made regulations to adjust the CTC's mandate if necessary.

Policy directions are presently used sparingly,[30] and only when an informal policy statement is considered to be insufficient. Their use has generated a great deal of controversy. There are mixed views as to their appropriateness and their potential for swift and effective transmittal of government policy (see Roman, 1981; Rankin, 1985; Townsend, 1984). There is increasing pressure to make them more generally available within the regulatory system counteracted by a strong resistance to this suggestion.

For example, some argue that the power to issue directions unduly compromises an agency's independence and the integrity of its process. Some would insist that the executive go to Parliament whenever it wishes to change administrative policy (see Roman, 1981: 5-157). We agree with this if what is involved are important changes to an agency's overall objectives. Action by Parliament can legitimize those changes. This increased legitimacy can in turn enhance compliance with the objectives of the amendment. However, the parliamentary process can be slow, and it is subject to certain political imperatives which are not always conducive to effective and timely policy development.

Moreover, not all policy should be entrenched in legislation. In our discussion of the legislative process we suggested that some may not be of sufficient durability to be the stuff of which legislation is made. Much depends, then, on the magnitude of the contemplated change. Indeed, the executive, in issuing a policy direction, should not seek to effect a change in the mandate or the legal interpretation that a court would place upon it (see *Laker*, [1977] 1 Q.B. 643). What it can try to do is to change the agency's interpretation of its statutory mandate, or to spell out general policies by which the agency should be guided in carrying out its mandate. We have already acknowledged the legitimacy of subordinate legislation for this task. And certainly, where there is a concurrence of view between Cabinet and the agency as to the policy to be laid down, the notion of a direction raises few difficulties.

Characteristically, however, directions are used to resolve real or perceived policy differences between the executive and the agency or, more precisely, between a department and the agency. Here there is a risk that directions will interfere with the administrative process, undermine the expectations of at least some of the parties, and raise questions about who is really in charge. It is in this respect that directions are perceived to challenge the independence of agencies and the integrity of the administrative process.

This tension is particularly evident if the intent in issuing a direction is to influence a policy question that has arisen in the context of an existing application. Here, directions may be perceived as changing the rules in the midst of the proceeding. However practical this might seem from a governmental perspective, agencies, as well as those who claim a stake in the outcome of their proceedings, view it with abhorrence. "Stop orders", which we tentatively recommended in Working Paper 25, (see LRCC, 1980: Rec. 4.9)

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30. For example, no directions have been issued explicitly pursuant to the statutory authority in section 7 of the *Atomic Energy Control Act*. However, the Atomic Energy Control Board has received ministerial instructions, by which it considered itself bound, concerning the Atomic Energy Control Board, *Uranium Information Security Regulations* (C.R.C., c. 366), uranium pricing and nuclear safeguards.

to halt proceedings pending the development of a policy, are viewed as a blatant interference with what the parties expect to be the rules that apply in dealing with their applications. "Freeze orders", to preclude agencies from taking up new applications until the policy has been settled, are shunned as instruments of delay.

The intrusive impact on an agency can be reduced if directions are not used as instruments of political control over agency decisions, but only as formal means of guidance. Yet, to a greater or lesser degree, all policy directions are intended to affect decisions. So are all other forms of law making. Some directions are more intrusive than others. Those that are issued in advance of specific cases and that purport to be of general application are perceived as being less so than those that respond directly to issues arising in the context of a particular case. Even this distinction is difficult to make, however, where an agency regulates a monopolistic enterprise. Here, every policy direction by Government aims at having a potential impact upon the affairs of the regulated industry.

Policy directions, then, carry with them a number of inherent risks which Parliament must accept when it empowers the executive to issue them. To minimize these risks, they should be used only within narrow parameters. *Policy directions should be issued only to address general policy issues in advance of specific cases* (see LRCC, 1980: Rec. 4.5). They should be viewed as legislation, not as "decisions" (see *Salco Footwear*, [1983] 1 F.C. 664 (T.D.)). If Parliament wishes to authorize executive control over individual cases, it should resort to other, non-legislative mechanisms (see section V of this Report). Furthermore, *Parliament should empower the executive to issue policy directions only to those agencies that have broad mandates to develop and apply policy in areas of activity that Parliament determines, on a statute-by-statute basis, to be suitable for executive guidance*. If, as we suggested above, agencies are to enjoy greater autonomy in developing regulations on matters affecting their areas of responsibility, an important counterbalance could sometimes be to allow the executive to intervene through the use of directions if Parliament foresees that agency regulations may touch sensitive issues of central policy planning (see Canada, House of Commons, ..., 1980: Rec. 10; Royal Commission ..., 1979: Rec. 18.5; Economic Council of Canada, 1979: p. 67, Rec. 5; Garant, 1985: 159). *However, it should not be permissible to issue directions to agencies that perform solely adjudicative or courtlike functions* (see LRCC, 1980: Rec 4.3).

Given the limited role we envisage for them, *policy directions should take the form of regulations*.[31] We would not formalize the "directive" or "direction" as a discrete category of subordinate legislation. Our approach would avoid the confusion that currently surrounds the term "directive". It would also bring into play certain other benefits long associated with the status of regulations as statutory instruments.

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31. See *Salco Footwear*, p. 673. The New Brunswick statute book contains at least two examples where directions are said to be regulations: section 17 of the *Motor Carrier Act* and section 8.2 of the *Public Utilities Act* are identical:

> (1) The Lieutenant-Governor in Council may by regulation establish policies and rules to be observed by the Board in the exercise of any jurisdiction or authority conferred upon it under this Act.
>
> (2) Subsection (1) shall be deemed not to authorize any regulation directed specifically to any application, matter or decision pending before the Board.

First, our suggested approach would clearly establish that issuing policy directions is a legislative act, in nature and effect. It would eliminate the possibility of seeing this type of directions as administrative in nature, binding upon the agency but unenforceable in the courts.[32] This latter course could create in parties to proceedings expectations about agency behaviour without giving them a corresponding ability to enforce agency compliance.

Second, to issue directions in the form of regulations would create a presumption against their retrospective application. This would limit the possibility of issuing directions to interfere with specific cases. To preclude the agency from processing new applications pending the development and announcement of government policy on an anticipated issue, we still favour, as we did in Working Paper 25 (LRCC, 1980), the authority to issue ninety-day "freeze orders". But we no longer endorse "stop orders" to halt a proceeding already under way.[33]

Third, the provisions of the *Statutory Instruments Act* would thus apply to directions. This would ensure that they be published in the *Canada Gazette* and tabled in Parliament. They would also be subject to scrutiny by the Standing Joint Committee on Regulations and Other Statutory Instruments.[34]

Fourth, agencies would be able to initiate the process for political direction, much as they do today when they wish the Government to make a regulation. The normal process of policy development should still be spearheaded by the agencies themselves; for this purpose, we have already recommended that they be given wider powers to make regulations. We realize, however, that there may be occasions when the agency perceives a need for the political clout that an executive policy direction could provide.[35]

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32. Policy directions have the status of law when they are contained in a formal instrument such as an Order in Council. In this case, they must be adhered to by the agency to which they are directed. Agency decisions are subject to judicial review to determine whether or not they conform to the directions (see *CSP Foods*, [1979] 1 F.C. 3 (C.A.) and [1983] 1 F.C. 55 (C.A.)). If policy "directives" are contained only in guidelines of one sort or another, they do not have the force of law. If such "directives" were followed as though they were law, it would leave the decision maker open to an allegation that he had unlawfully fettered his discretion (see *Maple Lodge Farms*, [1982] 2 S.C.R. 2; also *supra*, note 28).

33. See LRCC, 1980: Rec. 4.9. This recommendation did not distinguish between "stop" and "freeze".

34. Of interest here is *Salco Footwear*, which held that a ministerial direction concerning the determination of the value of imported goods was "in fact a statutory instrument made in the exercise of ... legislative power ..., and consequently a regulation which must be registered ..." ([1983] 1 F.C. 664 (T.D.), p. 676).

35. This does not mean that we think it desirable for an agency to be able formally to request a direction. We disagree with the observations in the *Report* of the Special Committee on Regulatory Reform (see Canada, House of Commons, ..., 1980: 16), that regulatory agencies should be able to request that the Government issue a policy direction, or that a party to a regulatory proceeding should be able to ask an agency to request that the Government initiate a policy direction process. By implication, the granting of such rights would create a corresponding duty for the Government to act, a duty which should not be imposed. On the other hand, if no such duty is imposed or implied, it is not clear how the creation of a right to request a policy direction would alter the current situation in which anyone can approach Cabinet through normal political channels to request its intervention.
We would disagree with measures such as a recently proposed amendment to the *Canadian Radio-television and Telecommunications Commission Act* that would allow the issuance of a direction concerning any matter within the Commission's jurisdiction by the Governor in Council, of his own motion *or at the request of the CRTC* (see Bill C-20, 1984).

Directions should only be issued after an appropriate measure of consultation, particularly where they would effect a substantial policy change. The manner in which directions are presently issued rarely gives interested persons an opportunity to influence government policy.[36] The forum for consultation should be flexible. It could be the agency itself, the appropriate department, a parliamentary committee or a royal commission or other commission of inquiry. The choice should be influenced by the context in which the policy issue arises.[37] In all cases, however, there should be a public record of the views of those participating in the process against which the policy established by the executive can be measured.

We are further of the view that *in those instances where there is a perceived need for statutory authority to allow the executive to issue binding policy directions, it is the Governor in Council who should be empowered to do so. Individual ministers should not have the authority to issue them*, for two reasons. First, policy directions should reflect broad governmental policy, not policy viewed through the lens of a single department. Second, a minister may find himself caught in the middle of a conflict between the agency and his own department, and may well be in need of the buffer that a Cabinet decision can provide.

Directions conveyed through regulations would almost always be general, and would require contextual interpretation. Nonetheless, *we do not think that an agency should be allowed to refer a policy direction back to Cabinet for interpretation or clarification*, any more than it can refer a statutory amendment back to Parliament, or any other regulation back to Cabinet. (This is a change from Working Paper 25, Rec. 4.10 (LRCC, 1980).) To us, a policy direction is a formal legislative instrument. The agency should interpret and apply that instrument, as it would any other law, until it is replaced by the authority that issued it or definitively interpreted by the courts. We do not wish to encourage agencies to shun responsibility for the resolution of difficult problems of interpretation. Nor do we wish to tempt Cabinet, through a request for clarification, to extend its policy to new or modified situations without following the normal process in issuing a new regulation.

We are not endorsing the general use of policy directions. Their potential negative impact upon the administrative process concerns us. We find them inappropriate to exert direct control over agency decisions, especially with respect to specialized adjudicative

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36. For example, none of the directions issued to the CRTC was preceded by a formal process which would have accorded interested parties an opportunity to make representations to the agency or to the Government. Some *informal* consultation did take place.

37. See Canada, House of Commons, ..., 1980: 17. This approach is a change from Working Paper 25, Rec. 4.7 (LRCC, 1980), which stated:

> 4.7 prior to the issuance of a policy direction to an independent agency, the Government should refer the matter to the agency, which may request public submissions thereon and shall make a public report within ninety days or such longer period as the Government may specify, and further, such directions should be published in the *Canada Gazette* and tabled in the House of Commons.

We find it almost so trite as not to need saying that where the agency is not selected as the forum for consultation, its comments should still be sought as to content and drafting. A direction should not be issued without the benefit of the agency's expertise. Indeed the Economic Council of Canada, 1979: p. 67, Rec 1(i), went so far as to insist that an agency report first before a direction is issued.

functions. We also insist that the limited role we see for Cabinet in influencing agency policy be played through statutory instruments. Finally, if policy directions are to be issued, they should be issued sparingly, not as a means of routine intervention in the normal functioning of administrative agencies (see LRCC, 1980: Rec. 4.6). All of this is necessary if any regime of directions is to reflect the values we have put forward. *Where Parliament chooses to give responsibilities to independent administrative agencies, it is crucial to encourage a strong sense of agency responsibility for policy development, and to recognize that policy directions are to be used only where policy elaboration by the agency could unduly compromise a larger governmental policy.*

To the extent that policy directions are issued responsibly and with restraint, we believe that the administrative system can accommodate them. Agencies and the public can accept the political reality that while an agency may be given an important policy role by Parliament, it is not independent in an absolute sense. After all, agencies do not act in isolation. They are part of the machinery of Government, and act within that wider context. What agencies and the public reject are executive initiatives to change the rules of the game within an adjudicative phase of an agency's proceedings, in the expectation that the agency will graciously comply. Stated otherwise, the issue is the degree of legitimacy attributable to a given direction: Is it perceived as disruptive and illegitimate, or as normative and legitimate? To help ensure the latter, *the authority to issue policy directions should be governed by statute, openly exercised, subject to consideration by Parliament and used in a way that will minimize interference with the role Parliament has given to the agency to perform.*

III. Agency Statements of Policy

No provision of an agency's formal mandate, whether embodied in a statute or a regulation, is so precise that the agency need not interpret it. In some cases an agency must exercise considerable discretion when applying governing provisions in specific situations. We have already stated that it is inevitable, and desirable, that agencies should play a key role in framing policy. They should also be encouraged to work, both formally and informally, at structuring and communicating the criteria upon which they base their decisions. Since most of us must frequently plan activities in anticipation of how an agency will administer its mandate, and how it will exercise the associated discretion, there is an interest in having agency policies formulated and made known as early as possible. There is also an interest in providing an opportunity for people to influence the process within which policy is developed.

Administrative agencies are not courts. They are not required to rely on the evolutionary, case-by-case method traditionally associated with court process in the common law world. They are not, and should not be, faced with the same constraints on prejudging the meaning of a legislative provision. The emphasis is upon administration, not dispute resolution writ large. While adjudication is, and will remain, an important aspect of agency process, there is ample scope for the agency to play a normative role that complements adjudicative discretion.

When disposing of a question, the agency knows that it affects interests beyond those directly concerned by the immediate application. Because of this wider impact, it has to perform two sometimes conflicting exercises: on the one hand, to question the wisdom of its policy and to see whether, in the immediate situation, that policy promotes the objectives set out in the mandate; on the other, to keep in mind the broad application of the policy, and avoid the prospect of a series of inconsistent decisions. One approach may be to adjust procedures in order to accommodate a wider range of interests when adjudicating. However, the more interests that are included within a proceeding, the more complex and protracted it can become. Procedural rights which may be appropriate for determining the interests of a person aggrieved, such as the right to call and cross-examine witnesses, may well be claimed by participants whose interests are related only to the broad policy to be adopted and not to its application in the particular case. The proceeding may become lengthy and costly to those parties who have the most at stake. This will not always be the most appropriate way of disposing of the policy issues that are involved.

Another approach warrants close attention, especially where a large volume of cases is handled. *Agencies should consider carefully the advantages of developing policy statements about how they will exercise their discretion or interpret their legislation, before they are required to do so in a specific application.* They should separate policy considerations relating to a range of applications from the particularized considerations applying to individual situations. What we suggest here is by no means novel. There are several examples of this practice: Revenue Canada publishes interpretation bulletins and information circulars; the Canadian Pension Commission has published guidelines; the CRTC from time to time adopts and publishes public notices in the *Canada Gazette* about policy guidelines.[38] Policies can be developed outside the context of specific applications, and what might be called "generic hearings" could be held to acquire the necessary input.

In supporting this approach we do not mean to deny that discretion has an important role to play in administrative decision making. Many decisions cannot be reached by resorting solely to pre-established standards; there may be insufficient accumulated experience on which to base a general policy; heterogeneity of regulatees may make the imposition of inflexible standards either impossible or undesirable. Some decisions are better reached through a process of negotiation among the interested parties — as occurs when the CRTC sets individual licence conditions — than through fixed rules.[39]

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38. The more than five hundred Tax Interpretation Bulletins are continually updated to reflect changes in the law, and they occasionally even note how budget proposals would affect the area in question. Although they indicate the Department's policy and interpretation of the *Income Tax Act* and regulations, and can be an important factor in case of doubt about the interpretation of a legislative provision, the Bulletins are not determinative or binding (see *Harel*, [1978] 1 S.C.R. 851, p. 859; *Nowegijick*, [1983] 1 S.C.R. 29, p. 37). A recent (January 1984) example of policy articulation is a "Statement of Intent" issued by Revenue Canada (Customs and Excise) concerning the administration of certain provisions of the recent *Special Import Measures Act*.
For the CRTC, see Johnston, 1980: Chap. 7. For example, the CRTC published guidelines for the purpose of facilitating the preparation of applications by cable licensees for the exhibition of the "3 + 1" CANCOM services (see Public Notice CRTC 1983-109 and Public Notice CRTC 1983-164).

39. In this regard, see Viscusi and Zeckhauser, 1979, where it is argued that a well-designed regulatory policy should take the heterogeneity of regulatees into account (see also Popper, 1983; Richards, 1982; Sproule-Jones and Richards, 1984).

None of this, in our view, detracts from the fact that agencies should pay more attention to the importance of making advance statements of policy. We cannot accept that agencies never consider issues before they arise in particular cases, any more than we think that they are blind to the broad impact of the policy choices they face. But they are often reluctant to signal in advance their general approach to issues falling within their range of discretion. Those who deal with the agency should know about its views even though they may only be tentative. They should have an opportunity to influence them as early as possible. In turn, the agency should try to benefit from the thoughts of those people.

Policy statements can facilitate voluntary compliance, ensure greater consistency in decision making and encourage accountability.[40] The Supreme Court of Canada sees them as not only permissible, but "eminently proper" under existing law, so long as agencies do not regard them as binding rules, and do not thereby fetter their discretion in making decisions (see *Capital Cities*, [1978] 2 S.C.R. 141 and *Maple Lodge Farms*, [1982] 2 S.C.R. 2). Therefore, agencies need no legislative authority to adopt them. Nevertheless, we think that agencies would benefit from direct legislative encouragement. Accordingly, *Parliament should confer on independent administrative agencies, as an express statutory power, the authority to formulate non-binding policy statements.*

We would go even further, and suggest that *agencies should be authorized to issue binding policy statements* (a term we use here to distinguish what we have in mind from rules or regulations emanating from itemized grants of subordinate legislative authority) *to structure, in a definitive way, areas of discretion left to the agency by Parliament.* Working criteria expressed in non-binding policy statements should be allowed to crystallize into binding ones wherever an agency has a firm view of what ought in all cases to condition the exercise of its discretion. This eliminates needless and repetitive argument in individual cases about the appropriateness of the policy.[41] Furthermore, when an agency's enabling legislation confers on it authority (for example, to censor) that would limit a right entrenched in the *Canadian Charter of Rights and Freedoms* (for example, freedom of expression), it may be essential for the agency to be capable of issuing a legally binding rule. Otherwise, the limitation may not be considered as being "prescribed by law" so as to justify it under section 1 of the Charter (see *Ontario Film* (1983), 147 D.L.R. (3d) 58 (Ont. Div. Ct.); (1984), 5 D.L.R. (4th) 766 (Ont. C.A.)). An example of a power to issue binding policy statements can be found in subsection 22(2) of the *Canadian Human Rights Act*, which authorizes the Canadian Human Rights Commission

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40. For a thorough discussion of the benefits to be derived from confining and structuring discretion through rule making, see Davis, 1969: 215-33 and Janisch, 1979: 95-100. However, the importance of structuring discretion must not be overestimated (see Baldwin and Hawkins, 1984).

41. See Janisch, 1979: 97, who points out that in *North Coast*, [1972] F.C. 390 (C.A.)), the Federal Court of Appeal knew full well that "of over 400 charter carriers affected, only some 58 filed representations and that none of them persuaded the Commission to change its policy." Also of interest in this regard is the *Statement on Guidelines for Choosing the Appropriate Level of Agency Policy Articulation*, adopted by the Administrative Conference of the United States, June 10, 1983.

to issue guidelines setting forth the extent to which, and the manner in which, a provision of the Act applies to a particular case or class of cases.[42]

We associate this structuring of discretion with the orderly elaboration of the agency mandate. Although much of the discretion that Parliament leaves agencies is intended to permit the agency to "manage" a situation on an individualized basis, some of it simply reflects an inability to articulate policy and criteria for decision making without the benefit of ongoing regulatory experience. Our proposal, simply stated, is this: *Where an agency structures its discretion in practice, the legal scope of its authority should be brought into line.* In Working Paper 25 we went so far as to recommend that "when an agency has appropriately articulated a once vague mandate, it should be inserted into the enabling Act" (see LRCC, 1980: Rec. 3.13). We now believe that much of what was covered by this is better secured through subordinate legislation than through statutes. To achieve this in areas of agency discretion, *we advocate the use of binding policy statements to achieve more structure in the agency mandate.*

Since these statements would cover areas of discretion in decision making, they would not create obligations on private persons.[43] Rather, they would condition the agency's area of discretion to the benefit of those who deal with it: having laid down conditions or entitlements, the agency would be bound by them until it changed them. The agency would benefit by discouraging repetitious, empty applications. What the public would gain are certainty and a greater sense of equal treatment.

In view of their self-regulatory character, binding policy statements should be open to scrutiny and direct participation in their formation. Because they would represent a special manner in which discretion is exercised, however, the scrutiny and participation processes should be flexible so as not to discourage agencies from undertaking this new process. For example, like agency regulations, they should be subject to notice and comment procedures, but should be exempted from the preliminary screening requirements of the *Statutory Instruments Act*. The processes used to allow participation in regulation making may well prove useful. Other suggestions have already been put forward (see Weiler, 1980: 131). To date, the experiences in this regard have been encouraging. For the time being, agencies should be allowed to experiment. To overformalize the process at this stage might make agencies reluctant to exercise this authority. Furthermore, it could open the door to executive control over matters better left to agency experience and expertise. We see a role for such control only where Parliament has expressly conferred upon the executive the authority to issue policy directions.

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42. Any such guideline is binding on the Canadian Human Rights Commission until revoked or modified by it. Subsection 22(2.1) requires that guidelines which apply in a class of cases be published in Part II of the *Canada Gazette*, and that guidelines which apply to a particular case be communicated to the persons directly affected. Pursuant to subsection 22(2), the CHRC has promulgated the *Equal Wages Guidelines* (SI/78-155 as amended by SI/82-2), the *Immigration Guidelines* (SI/80-125), the *Bona Fide Occupational Requirements Guidelines* (SI/82-3) and *Age Guidelines* (SI/78-165). At present, the Canadian Human Rights Commission is considering the implementation of further guidelines. The Canadian Human Rights Commission also promulgates "guides", which in distinction to the subsection 22(2) instruments, are not binding on the Commission or its tribunals.

43. Thus avoiding any risk of imposing liability, criminal or otherwise, for their breach.

Agencies should be required to maintain all policy statements, binding or not, in an accessible format, and to publish them when they are made. Binding policy statements should also stand referred to the Standing Joint Committee on Regulations and Other Statutory Instruments and be subject to disallowance by Parliament.

Initially, agencies may not use widely the authority we propose here to make binding policy statements. We sense a strong bias towards the case-by-case exercise of discretion (see Edge, 1982). Most agencies as yet display only a cautious willingness to structure discretion, and then only informally, through non-binding statements. We hope that agencies will resort to them more frequently. We also hope that the experience gained by the Canadian Human Rights Commission in dealing with section 22 of its constituent Act will be instructive as to the practical implications of extending similar authority to other entities of the federal system.

IV. Parliamentary Review

At present, no formal procedure allows Parliament to modify or reverse an agency decision. Unless it countermands an agency decision by legislating, Parliament must live with it. The integrity of the agency process demands appeal or review by another agency or by a court, not by Parliament or, as we shall argue shortly, the executive. Questions may be raised in Parliament and parliamentary committees about the propriety of individual decisions. However, Parliament remains a forum for discussion, not direct response. Its influence on agency decisions is indirect, promoting over a longer term the attitudes that it wants an agency to take when carrying out the tasks it is given.

The prevailing view seems to be that Parliament has for some time exercised little meaningful control over independent administrative agencies (see Slatter, 1982: Chap. 4; Royal Commission ..., 1979: Chap. 21; Canada, House of Commons, ..., 1980: 22). Annual appearances before standing committees are often *pro forma* rituals. Parliamentary scrutiny of estimates is rarely a rigorous test. Agency annual reports contain an array of facts but give Parliament little means for assessing how major policies are carried out.

Much has been written over the past ten years suggesting ways of improving accountability to Parliament and allowing for effective parliamentary input into agency policies. In truth, some progress has been made: we have already mentioned the work of the Standing Joint Committee on Regulations and Other Statutory Instruments; the *Access to Information Act* allows members of Parliament access to the information they need in order to call agencies to task in committee or in the House; the Office of the Auditor

General has acquired considerably more power; one of the new Standing Orders of the House of Commons, instituted as a trial measure in 1983, provides that agencies' annual reports stand permanently referred to the appropriate committee.[44]

It is our view, however, that more must be done. *The standing committees should play a more direct role. They should have a clear mandate to scrutinize the activities of particular agencies*. That they automatically receive all agency reports tabled in Parliament is not sufficient. *They should begin to exert influence over the shape and content of agency reports* to ensure that they provide the information necessary to understand the agency's role. Annual reports, in particular, should identify the mandate and objectives of the agency, set out how they are interpreted, outline the philosophy of the agency, and describe the plans it has to achieve its objectives (see Slatter, 1982: 124-6). They should also outline the agency's major activities during the year and explain how these activities have helped it to achieve its goals. *Parliament and parliamentary committees should also be more active in monitoring and reviewing*, and thereby influencing in an open manner, *the exercise of subordinate legislative authority relating to agency activities*.

But parliamentary committees, to make an adequate evaluation, require more than information. They must acquire an understanding of the pertinent legislation, regulations and policy statements, and of their practical implications. Smaller committees, with continuity of membership, could promote the development of greater expertise. This, however, entails time, research and study that is not easily accommodated within the busy schedule of the average parliamentarian. It requires resources that have not traditionally been made available to parliamentary committees. At the very least, a moderate secretariat should be provided to each committee to help its members to focus on the key issues of concern.

Institutional changes of this nature would have to be undertaken before any serious consideration could be given to current reform proposals aimed at stimulating systematic evaluation of an agency. Experience has shown that "sunset" provisions[45], for instance, are difficult to manage, given so many competing demands on parliamentary time. Problems experienced with the *Bank Act* place in question their utility under the present system. And, without a strong parliamentary committee system, such provisions could unduly compromise the independence of agencies by effectively forcing them to account directly to Cabinet in order to precipitate the action necessary to secure their periodic renewal.

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44. Standing Order 46(4) (see Canada, House of Commons, 1982: Issue No. 7, p. 21). Recently, there have been two further encouraging developments respecting parliamentary control over the actions of government agents. One is *An Act to amend the Financial Administration Act in relation to Crown corporations and to amend other Acts in consequence thereof*. The second is contained in the *Western Grain Transportation Act*, ss. 22-27; Parliament provided a process for scrutiny of proposed regulations, including an affirmative resolution procedure.

45. A sunset provision "provides that an administrative agency ceases to exist at the end of a fixed period of time unless its mandate is renewed by the legislature" (see Slatter, 1982: 131-2).

Even within a reinforced framework of direct and effective parliamentary review, we doubt the need to introduce sunset provisions. There already exist several mechanisms through which agency evaluation could be carried out, if explored to their full potential. Estimates is one of these. Discussion of the annual report is another. On the whole, parliamentary attitude is more crucial than the form in which accountability is promoted. Indeed, "at bottom, the problem of Parliamentary reform is political and attitudinal, not organizational and procedural" (see Thomas, 1983: 20). *If Parliament wishes to hold agencies accountable, we think it can do so much better than at present by fine tuning and by using efficiently the more traditional mechanisms of parliamentary democracy.*

Reform of Parliament is a broad and difficult topic that, while touching our mandate, does not strictly speaking lie within it.[46] But because the legal framework for agency decision making we recommend depends significantly upon Parliament reviewing the activities of agencies to which it gives independence from the executive, *we urge Parliament to take swift and concrete action to consider seriously what is being recommended, both by this Commission and by others. Above all, we implore it to develop ways to put to good use the tools it already has.*[47] If it does not, complaints by parliamentarians that they have lost control over the system will indeed ring empty.

V. Executive Review

A. Political Appeals

Parliament has provided for a number of political appeals. By this we mean a statutory right given to a person to apply to Cabinet, or to a minister, to review the decision of an agency, and a correlative power in Cabinet or the minister to determine the outcome of the matter.[48] The relatively frequent use of these provisions in recent years has given rise to extensive discussion of their appropriateness and of the procedures that should be followed in invoking them (see Canada, House of Commons, ..., 1980: 17-9; Royal Commission ..., 1979: 318-9; Economic Council of Canada, 1979: 59-60; Rankin, 1985; Garant, 1985: 159-60).

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46. For a discussion of parliamentary reform, see Canadian Bar Association, 1982. The Special Committee on the Reform of the House of Commons (McGrath Committee) is presently studying these issues.

47. Moreover, Parliament has not even given itself the tools necessary to make use of other controls it has adopted (see discussion of the disallowance process *supra*, p. 22-3; Slatter, 1982: Chap. 4; and Canada, House of Commons, ..., 1980: 21-5).

48. A familiar example is subsection 64(1) of the *National Transportation Act*, which authorizes a review, by petition to the Governor in Council, of certain decisions of the Canadian Transport Commission and the CRTC. Section 25 of the same Act provides a second example. Under this section, an applicant or an intervenor on an application to the Canadian Transport Commission for a licence to operate a commercial air service, a motor vehicle or water transport undertaking, or for a certificate of public convenience and necessity in respect to a commodity pipeline, may appeal to the Minister from a final determination of the Commission, and the Commission is bound to comply with the Minister's opinion in the matter (for a list of political appeal provisions, see Vandervort, 1979: App. A; also generally, Kenniff *et al.*, 1978).

Political appeals are not like appeals to courts. They raise questions of policy, not of fact or law. They are handled differently: formal representations coexist uncomfortably with external lobbying. The process generally lacks any procedural requirements. Agency determinations can be reversed on the basis of "evidence" unrelated to the considerations regarded as relevant by the agency. Decisions are rarely supported by reasons; Cabinet appeals, in particular, have become highly secretive processes.[49] We know very little about what motivates Cabinet to act, what the range of its considerations may be or what its sources of information are.

Political appeals are usually regarded as serving one or both of two purposes: first, to permit a party to an administrative proceeding to request a review of the merits of a decision; and second, to offer the Government an opportunity to keep a check on the agency and to influence its direction where it appears to have gone astray. In our view, they do not achieve either of these objectives adequately.

As to the first, we think that political appeals are overly susceptible to extraneous influences and to being coloured by political imperatives. A political appeal is particularly inappropriate if the agency was originally established to insulate certain decisions from the pressures of mainstream politics. Beyond this, to reverse an agency decision for what might be seen as partisan political purposes detracts from the integrity and the credibility of the administrative process. It can be demoralizing for the agency (see Janisch, 1979: 69) and the parties to have worked diligently through a file only to be reversed on what may be perceived to be extraneous factors. We do not suggest that this is always or necessarily the case, but rather that there is a risk that political appeals may yield such results.

Nor do we think that political appeals are an appropriate means of providing a measure of political control over agency decisions. For one thing, appeals are triggered by the parties, not the executive.[50] For another, with today's emphasis on due process, an "appeal" is likely to give rise to procedural claims that are incompatible with the notion of political intervention. Indeed, there are those who would advocate judicializing the appeal process by engrafting procedural safeguards onto it (see Canada, House of Commons, ..., 1980: Rec. 12; Royal Commission ..., 1979: 318-9; Rankin, 1985: 43-6, 54-5). Parliament ought not to require Cabinet to set public policy in the context of a specific case or in a process limited by judicial concepts such as "deciding on the record". Furthermore, political intervention in agency decisions, if it is to exist, should not hide behind adjudicative language such as "appeal" or "review".

Some have suggested that Cabinet appeals ought to be retained to enable Cabinet to review the application of its policy directions to agencies (see Canada, House of Commons, ..., 1980: Rec. 11; *contra*: Royal Commission ..., 1979: Rec. 18.7; Economic

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49. See *Inuit Tapirisat*, [1980] 2 S.C.R. 735; [1979] 1 F.C. 710 (C.A.), where the Court, dealing with subsection 64(1) of the *National Transportation Act*, not only found no fairness or procedural requirements, but held that "... the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries" of the subsection (p. 756 (S.C.R.)).

50. In some instances, Cabinet can initiate the review process; see *infra*, p. 37. We do not consider these to be *appeals*.

Council of Canada, 1979: p. 67, Rec. 1; Rankin, 1985: 53-4). We disagree. As we have stated already, agency compliance with policy directions raises questions of legal authority, not policy, and is a matter for judicial, not political review. Cabinet intervention in this respect would impinge on the integrity of the system.

The problems with political appeals are fundamental, not procedural. Two diverse objectives are confused within a vehicle that is not particularly suited to either. True rights of appeal for participants in the administrative process should be established within an adjudicative framework involving appropriate administrative review agencies. Cabinet powers to reverse agency decisions should be exercised through a vehicle suited to the intrusive and political nature of such powers.

Consequently, if Parliament feels that a matter is sensitive enough to warrant possible executive intervention in the decisions of an independent administrative agency, it should give Cabinet (but not, for the same reasons we gave concerning policy directions, a single minister) *the power to act on its own initiative. Most importantly, the issue should be clearly taken away from the agency and brought within the political arena.* In our view, placing the full political responsibility on the executive would have two advantages. First, it would limit the availability and use of such authority to those situations where the public importance of a question would, in the public eye, outweigh the obvious intrusion upon agency independence. Second, it would tend to divorce the agency from the political decision, helping to preserve its independent image.

In our view, then, while subsection 64(1) of the *National Transportation Act* should cease to provide the parties with a right to petition for review, it could continue to allow the Governor in Council, "in his discretion", "of his own motion", to "vary or rescind any order [or] decision" of the CTC or the CRTC, and to make an order "binding upon the Commission and upon all parties", if Parliament considers that the issues at hand could warrant this kind of intervention. This model, while blatantly political, is more appropriate for Cabinet intervention than the full panoply of "remedies" the section currently provides.[51]

The timing of the exercise of such an intrusive power is important. On the one hand, we can see good reason to preclude its use until the agency has rendered its decision. This would allow for the development of a record on which the issues at stake could be revealed publicly. It would also help to ensure Cabinet accountability for the decisions it eventually makes, where those decisions relate directly to the administrative process. While we do not think that Cabinet ought in law to be *bound* by the record in making a political judgment, we do realize that the existence of a record can help to focus that judgment on the relevant issues.

On the other hand, there may well be situations where it is known from the outset that a political solution will likely be imposed. Going through the motions of a decision prior to Cabinet intervening could be a costly and protracted exercise in futility. If Cabinet

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51. Similarly, we would not be inclined to criticize section 23 of the *Broadcasting Act*, which allows Cabinet to set aside a decision of the CRTC regarding the issue, amendment or renewal of a broadcasting licence.

is determined to take the matter upon itself and out of the hands of the agency, we see no reason to wait. Accordingly, *we would allow a political intervention, if it is to be authorized, to be triggered at any point in the process.*

We would, however, urge strongly that Cabinet, having taken the decisional authority away from an agency, allow interested persons an opportunity to make representations before its decision is made. The fact that the decision to be taken is political does not reduce the value of allowing representations and of building a record.[52] One way to do this would be to convert the agency decision-making process into an inquiry, and to allow the agency to reflect its views in the form of recommendations (see Kenniff *et al.*, 1978: 226-7; Hartle, 1979: 132-3; Rankin, 1985: 57-8). This procedure would have the added benefit of giving the agency an opportunity to bring its influence to bear upon the issue.

In general, we regard the authority we have described as being of an exceptional nature, not to be easily granted by Parliament or routinely exercised by Cabinet. On balance, however, we prefer it to the "appeal" model if Parliament considers that an authority to intervene at the political level is warranted, and if the Government is willing to accept the responsibility.

B. Political Approvals

Some people may see value in requiring agency decisions to be subject to executive approval, particularly where the executive wants to keep a close tab on them. This approach would not only allow for a more systematic exercise of political judgment but would seem to avoid some of the difficulties we see with political appeals by building into the model an expectation of political intervention.[53] Some may feel for this reason that an agency that decides an issue "subject to approval" can hardly be called "independent".

And yet, whenever Parliament confers on an agency the power to decide, it seems that the public, as well as those with whom the agency must deal, expects a certain measure of authoritativeness and fair process in reaching those decisions, even though Parliament may have allowed for a political safety-valve. The agency is expected to bring some autonomy of thought to the decision. After all, it retains the initiative to provide

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52. An analogy might be made to the expropriation process. The decision to expropriate is regarded as political, usually involving an assessment of the public interest. Yet virtually all recent Canadian legislation provides interested persons with the opportunity to make representations prior to the expropriation.

53. If a low incidence of executive reconsideration is contemplated, it may well be preferable to give the agency greater independence and to allow for an exceptional use of political control through an interventionist mechanism such as that discussed in section V.A of this Chapter. Alternatively, if systematic approval of an agency's decisions still is desired, the question must be asked whether resort to a non-departmental agency is justified at all.

a decision to be approved; the executive cannot propose a disposition, as it could if a departmental decision-making model were adopted. Therefore, *even when an agency's decisions are subject to systematic approval, there remains an element of independence that must be respected if the integrity of the process is to be maintained.*

One of the difficulties inherent in this approach is that executive "intervention" is *built into* the decision-making process as a normal component, rather than as an exceptional form of political override. This can result in confusion as to the criteria that are followed by the agency. For example, the agency, in reaching its decision, is likely to be influenced by its perception of what will meet with approval. And yet, the process may not provide sufficient opportunity for interested participants to influence the policy that will determine the issue at stake in the decision. Cabinet may prefer informal and closed communication of policy standards to the agency, or the agency may be forced to draw inferences about government policy from insufficiently explained reactions to its prior decisions.

At the same time, an approval format can create further client frustration by masking the real center of decision-making authority, thereby eliminating the client's opportunity to deal effectively with the decision maker. This may be particularly so where the agency is fully independent with respect to some decisions (see for example, *National Energy Board Act*, s. 19(1) and 27), but not to others (*National Energy Board Act*, s. 44). The agency may be able to deflect criticism of its action by focussing on the fact of governmental approval. In turn, the Government may be able to shun responsibility for the decision by claiming its approval to be "routine".[54]

Without well-designed procedures, then, there is a serious risk that the "approval" process may compromise the openness, comprehensibility, fairness, efficiency and accountability we believe are appropriate in agency decision making. Such a result would reflect badly on both the agency and the Government. This may go a long way towards explaining the strong feelings harboured by some against the Foreign Investment Review Agency (see Arnett, Rueter and Mendes, 1984) even though, strictly speaking, it makes recommendations, and not decisions "subject to approval".

Consequently, where an "executive approval" model is used, certain formal requirements should be observed. First, *where a decision is not approved because of concerns not in issue before the agency itself, interested parties should be given an opportunity to address those concerns before the executive decision is taken.* This could be accomplished by referring the matter back to the agency for further representations and consideration. Second, to help ensure that such a requirement is observed, and to assist in the clarification of government policy, *an explanation for the refusal to approve an agency decision should normally be communicated to the agency and form part of its record. And finally, the executive should give policy directions to the agency from time to time*

54. In some circumstances this may unnecessarily discredit the agency; in others, it may discourage it from assuming its role as responsibly as it might otherwise do (see Rankin, 1985: 41-44).

to assist it in making its decisions. To encourage the executive to do so, and to deflect arguments about unlawful fettering of an agency's discretionary authority, Parliament should expressly authorize this practice in the relevant legislation.

These requirements may appear curious in view of our adverse reaction to the suggestion for process standards for political "appeals", and our ultimate rejection of "appeals" for a more intrusive and visibly political process of review. This is because we see intervention of that nature as being highly exceptional. With systematic approval, the situation is different. The more political control is integrated into an administrative decision-making process as a normal element, the more important it becomes that the values underlying administrative decision making be present in the exercise of that control. The choice of this decision-making model in lieu of placing the responsibility directly within a government department ought not, in our view, to cloak and confuse the responsibility that the executive ultimately must bear for the decisions that result. It is for this reason that we have opted for the process requirements that we have recommended.

VI. Judicial Review

This Commission has already dealt with the conceptual and technical aspects of judicial review in Report 14. We recommended there that the exclusive jurisdiction of the Federal Court to review federal agencies be maintained (see LRCC, 1980a: Rec. 1.1). We also recommended that one of the grounds for review be "error in law, including lack of jurisdiction, a wrongful failure to exercise jurisdiction, and abuse of jurisdiction" (see LRCC, 1980a: Rec. 4.3).

It is implicit in these recommendations that judicial review can influence agency decisions. A court's interpretation of an agency's constituent Act can expand or restrict the mandate of the agency. "Jurisdictional questions" (see Hogg, 1971) raise fundamental issues about how much leeway an agency should have in defining its role through the interpretation of its statutory mandate. To what extent should Parliament allow agencies to interpret statutory language? At what point should a court be able to say that an agency has stretched the meaning of the statutory language beyond reasonable limits? To what extent are courts appropriate bodies to determine these limits?

These difficult questions illustrate the importance of the institutional relationship between agencies and courts in the model for administrative decision making that we put forth. As Hammond has put it:

> The role of the courts in this model is to assist in articulating the integrity of the legislation, in seeing that that integrity is maintained, and in ensuring that agencies stay within the four corners of the legislative scheme as conceived. The model is a complex one and extends much further than the traditional models of delegated legislation. As a method of ordering, it does not rest on fiat in the traditional, hierarchical, linear sense. It explicitly recognizes the symbiotic relationship among all organs of modern government and makes all those organs responsible for the legislative health of an organic whole. (1982: 327)

In practice, however, each participant in Government does not necessarily share the other's view as to how the different roles should be played. Parliament has attempted, as have all Canadian legislatures, to protect administrative agencies against what is sometimes perceived as unwarranted judicial intrusion into areas of decision making that properly belong to administrators. "Privative" or "exclusionary"[55] clauses try to bar review, and "exclusive jurisdiction"[56] clauses try to vest agencies with the sole authority to determine factual issues underlying their decisions. Some may see the way the courts have interpreted these clauses as a tribute to their unwillingness to allow the executive to usurp their constitutional role. We feel, on the contrary, that they stand as monuments to the failure of *all* concerned — administrators, legislators *and* judges — to achieve a common understanding of the role of courts in public administration. Considerable tension has developed over the years, fuelled on the one hand by flagrant examples of bad administration and, on the other, by an overly critical attitude to administrative action within the legal profession. The problem is exacerbated by the fact that courts typically intervene in the administrative process on an *ex post facto* basis, and only where it is alleged that something has gone wrong. Those who perceive administration principally through the lens of judicial review can acquire a distorted view of the performance of agencies, one focussed more on their "pathology" than on their normal operations. (At least one appellate justice agrees that "lawyers are taught to look at administrative proceedings through the wrong end of the telescope": Blair, 1981: 14-5.)

The attitudes inherent in this situation are not easily modified. Much depends on how courts see their role. Because of their special status as interpreters of the Constitution, only they can, in the last resort, define this role. There appears, however, to be a cautious recognition by some judges of the importance of allowing agencies to develop the applicable standards in the light of their expertise and experience.[57] In particular, statutory interpretations by labour relations boards have been permitted to stand by the Supreme Court of Canada notwithstanding that the court itself might have attributed a different meaning to the provision in question. As long as the agency interpretation is not "patently unreasonable", the court has indicated a willingness to defer. To a large extent, this is the result of the strong privative clauses commonly associated with labour legislation. But it would undoubtedly be overstating the case to suggest that courts defer where there is a privative clause and review where there is none (see Mullan, 1983: 74).

In Report 14 we recommended the abolition of privative clauses (see LRCC, 1980a: Rec. 5.4). This has been criticized by those who regard them as the linchpin of judicial deference. Although there may well be some truth to this claim, it is our conclusion that

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55. An example of a privative clause is section 23 of the *Parole Act*: "An order, warrant or decision made or issued under this Act is not subject to appeal or review to or by any court or other authority."

56. For examples of exclusive jurisdiction clauses see *Canada Agricultural Products Standards Act*, s. 6.6; *Immigration Act, 1976*, s. 59; *Merchant Seamen Compensation Act*, s. 14. Typically, these clauses give an agency exclusive jurisdiction to determine all questions of fact or law in relation to any matter over which it is given jurisdiction. For a more explicit example at the provincial level see section 128 of the *Industrial Relations Act* (N.B.), where are listed specific issues which the Board is given exclusive jurisdiction to determine.

57. See *Nipawin*, [1975] 1 S.C.R. 382; *Canadian Union of Public Employees*, [1979] 2 S.C.R. 227; *Olds College*, [1982] 1 S.C.R. 923; *Massicotte*, [1982] 1 S.C.R. 710; *Blanchard* (1984), 55 N.R. 194 (S.C.C.).

they do little to foster the spirit of mutual respect that should exist between courts and agencies. Moreover, privative clauses are typically worded in technical language that does not express the policy underlying their use.[58] We consider it inappropriate that courts should be forced to draw inferences about parliamentary intent as to the scope of judicial review, based upon the presence or absence of a privative clause or upon variations in their technical language. For those reasons alone, we have no hesitation in reiterating our previous recommendation that *privative clauses, as we know them, should be abolished*. Beyond this, privative clauses have acquired a meaning in law that is narrower than appears on their face. They do not preclude judicial review on jurisdictional questions. There may also be a constitutional threshold of judicial review, either under section 96 of the *Constitution Act, 1982* or under the *Canadian Charter of Rights and Freedoms*, that they cannot affect (see *Crevier*, [1981] 2 S.C.R. 220; *McEvoy*, [1983] 1 S.C.R. 704; and generally, Mullan, 1982: 260-9 and 1983: 8-9). In short, privative clauses can mislead the uninitiated layman or lawyer into thinking that no avenue of judicial recourse is open to them. In our view, it is difficult to make a convincing case for their retention.

We believe that the repeal of privative clauses, or the failure to include one in a new statute, would not be interpreted by courts as a signal for more judicial review. Having said that, if Parliament were concerned about such an effect, whether general in scope or in relation to particular agencies, *we think it would be preferable, rather than retaining the technical and obscure language of contemporary privative clauses, to require clearly in legislation that courts show reasonable deference to agency expertise. At the very least, the parliamentary policy with regard to judicial review should be expressed in plain language*. Legislation should not furnish a trap for the non-specialist.

Such a legislative provision might stipulate that where error of law is alleged on the basis of the interpretation an agency has placed on a legislative provision it is required by law to administer, the Federal Court ought not to exercise its discretion to intervene unless the agency's interpretation of the provision is patently unreasonable. This would constitute an important reminder to courts of the importance of interpreting agency mandates contextually, so as to reflect concerns that can only adequately be understood through the experience of working with them on a day-to-day basis. It would also accommodate the reality that courts have a more valuable contribution to make in supervising agencies in the interpretation of some legislative provisions than in others.

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58. See e.g., s. 122 of the *Canada Labour Code* (as amended) which reads as follows:

> 122. (1) Subject to this Part, every order or decision of the Board is final and shall not be questioned or reviewed in any court, except in accordance with paragraph 28(1)(*a*) of the *Federal Court Act*.
>
> (2) Except as permitted by subsection (1), no order, decision or proceeding of the Board made or carried on under or purporting to be made or carried on under this Part shall be
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> (*a*) questioned, reviewed, prohibited or restrained, or
>
> (*b*) made the subject of any proceedings in or any process of any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise,
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> on any ground, including the ground that the order, decision or proceeding is beyond the jurisdiction of the Board to make or carry on or that, in the course of any proceeding, the Board for any reason exceeded or lost its jurisdiction.

Moreover, where judicial review of an agency decision puts in issue an important question concerning the criteria underlying the decision, *agency participation in the review process*, as is frequently the case with the Canada Labour Relations Board, *can help judges to understand the position of the agency*. Courts tend to be concerned with the impact that agency participation in review proceedings may have on the impartiality of an agency. However, they generally allow agencies to intervene to support their jurisdiction as long as they confine their role to an explanatory one and do not address directly the merits of their decisions.[59] The present law thus provides some scope for agencies to influence judicial attitudes, if agencies are willing, in appropriate cases, to take the opportunity to explain the basis for their interpretation of whatever legislative provision may be at the root of the jurisdictional dispute.[60]

VII. Summary and Recommendations

In this Chapter we have offered a view of how Parliament, Cabinet, ministers and courts, through a range of formal processes, influence the objectives, policies and criteria that guide agencies in their day-to-day decisions. We have called for agencies to assume a greater share of the responsibility for policy making, on the premise that Parliament and Cabinet are usually in a better position to react to policy issues in administrative decision making, than to lay down detailed directions for agencies to follow. We have also advocated a concept of judicial review that is sensitive to the respective roles of agencies and courts within the broad framework of government and have encouraged an attitude of reasonable deference to the policy choices made by public administrators.

Our study and analysis of this area over the past several years have left us with a sense that the independent administrative agency, as a model for delivering governmental services, represents an exception to the rule that administrative authorities should be established within departmental confines (see LRCC, 1980: Rec. 4.2). Political accountability for the exercise of power is an important constitutional principle. Because, in our system, this accountability traditionally has been rendered to Parliament, by an executive that normally is comprised of members of Parliament, there are strong pressures to keep administrative authority under the thumb of the executive. In the result, independent administrative agencies can be less easily accommodated under our system of government than under a system of constitutional separation of powers.

Nonetheless, independent administrative agencies do exist in Canada. Therefore, the role of the executive must be carefully considered to ensure that it does not impinge upon the necessary independence that must find its place in agency decision making. If the

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59. The leading case in this area is *Transair*, [1977] 1 S.C.R. 722; also, *Northwestern Utilities*, [1979] 1 S.C.R. 684. Canadian courts have not thoroughly addressed the issue of who may appear as parties, under what circumstances and in what role (see Dyke, 1984: 14; Mullan, 1977; Picher, 1984; for the Australian experience see Campbell, 1982).

60. Overall, however, we are inclined toward the view that the present law on agency standing in judicial proceedings is overly restrictive, and too accepting of courts as role models for agencies. We plan to address the broader issues of agency standing in a separate study in the near future.

agencies with which we deal in this Report were simply legislative or policy-forming organisms, there would be little resistance to the idea of maintaining close executive control over their activities. But the combination of statutory decision making with the policy-making function that is integrated into the former role creates complex issues that admit of no easy solution. Values such as fairness and efficiency require that the decision maker be respected. Integrity and authoritativeness suffer if the ostensible independence of an agency is compromised. Accordingly, hard choices must be made about when political influence is justified, and about how the executive can have its way, if it must, in a manner that derogates least from the integrity of the agency process. As we have tried to point out, each model of control has inherent difficulties.

In the end, we conclude that accountability for decision making is owed to Parliament, not Cabinet. Whatever supervision Cabinet exercises is delegated: the duty to account is still owed to Parliament. Parliament should be careful about delegating supervisory responsibility to the executive, for fear it may seriously compromise the goals originally sought to be achieved in setting up a decision-making process outside the departmental structure.[61] The more Parliament wishes to maintain the integrity of the process, the further it must distance the agency from the center of the political spectrum.

Independent administrative agencies will continue to exist and to be selected from time to time as a model for particular administrative purposes. We view it as our role, then, to recommend guidelines that will serve to assist Parliament and Government to choose an appropriate framework for conferring statutory decision-making authority upon these agencies. Accordingly, we recommend that:

1. **The accountability that agencies owe to Parliament should, in the normal course, be rendered directly to Parliament through its committee structure, not through the executive.**

2. **The constituent and enabling Acts relating to an independent administrative agency should define its broad objectives as clearly and in as plain and as unambiguous language as possible. However, they should not normally attempt to spell out the detailed policies required to implement these objectives. The dynamic nature of administration frequently requires that policy making be further structured within a subordinate legislative process as well as within the agency's own rule-making and decision-making processes.**

3. **Parliamentary assent is essential where the goal is not merely to clarify how the agency pursues legislative objectives, but to redefine its role and duties. Consequently, parliamentary approval should be required through an affirmative resolution procedure whenever the authority provided for by the *Public Service Rearrangement and Transfer of Duties Act* is used.**

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61. Slatter, 1982: 118, suggests that accountability should be *in*direct; yet, he was not focussing on decision making to the extent that we are.

4. **Because of the relationship between statutory decision making and the development of policy that informs administrative decisions, and because of the importance of broad participation in the setting of the policies that guide administrative decision making, independent administrative agencies should play a dominant role in whatever subordinate legislative process is provided for by statute.**

5. **It is frequently desirable that regulation-making authority be given formally to an agency. Where the mandate of an agency necessarily involves it in matters of policy, it should, in principle, be authorized to develop policy in the form of regulations. These regulations should not normally be subject to executive approval.**

6. **A pilot project should be undertaken exempting agency regulations that are submitted to a public notice and comment procedure from those requirements of the *Statutory Instruments Act* that precede registration and publication.**

7. **Authority to issue policy directions to independent administrative agencies should only exist where the agency has a broad mandate to develop and apply policies in areas of activity that Parliament determines, on a statute-by-statute basis, to be suitable for executive guidance. It should not be possible to issue directions to agencies that perform solely adjudicative or courtlike functions. Where authorized to be issued, directions should be issued by Cabinet, not by an individual minister, and should take the form of regulations. Thus, they should be legislative, not decisional in nature and effect, addressing general policy issues in advance of specific cases.**

8. **Agencies should be given the statutory authority to formulate non-binding policy statements about how they will exercise their discretion or interpret their legislation. In turn, authority should be given to permit non-binding policy statements to crystallize into binding ones whenever the agency develops a firm view of the policy that ought to condition its exercise of discretion in individual cases.**

9. **All subordinate legislation prescribing policy for statutory decision making by independent administrative agencies, and all binding policy statements adopted by an agency, should fall within the purview of the Standing Joint Committee on Regulations and Other Statutory Instruments.**

10. **The *Statutory Instruments Act* should be amended to allow for a general procedure by which Parliament could disallow regulations or policy statements adopted by the executive or an agency.**

11. **Parliament should take steps to ensure that administrative policy evolves in an orderly and open fashion. In order to help achieve this objective, Parliament and parliamentary committees should be more active in moni-**

toring and reviewing the exercise of subordinate legislative authority relating to agency activities. Committees should have a clear mandate to scrutinize the activities of particular agencies, and should exert influence over the shape and content of agency reports.

12. Although a strengthened committee system would make the use of new techniques of agency accountability such as "sunset" provisions more feasible than they are at present, Parliament should use more efficiently the existing mechanisms of parliamentary democracy to hold agencies accountable.

13. Decisions by independent administrative agencies should not be open to executive appeal or review at the instance of an interested party. Appeal or review should be to other agencies or to courts, not to political authorities.

14. Intrusive executive authority affecting administrative decision making should be both visible and politically accountable. If a political check on an agency's decisions is imposed by statute, the Cabinet, but not a minister, should be authorized to act on its own initiative to vary or rescind the decision or to remove the power of decision from the agency. The availability and exercise of this power should be exceptional, but where authorized it should be available at any point in the process. When the power is exercised, it should be clear that the issue is taken away from the agency and brought within the political arena. Interested persons should, nevertheless, on the political level, be given an opportunity to make representations before the decision is made.

15. Where a high incidence of political control is contemplated, it may be preferable to subject agency decisions to routine executive approval. In these cases Cabinet should be required to: refer a matter back to the agency before refusing approval because of a concern not addressed before the agency; communicate to the agency an explanation of its refusal to approve any decision; and give policy directions to the agency from time to time to assist it in making its decisions. Even when an agency's decisions are subject to systematic approval, there remains an element of independence that should be respected if the integrity of the agency process is to be maintained.

16. Privative clauses, as they are presently composed, should be abolished. If a special provision is felt necessary to insulate agency decisions from judicial review, it should be expressed in plain language. It should direct courts to show deference to agency expertise and, therefore, not to exercise their discretion to intervene unless the interpretation placed by an agency on a legislative provision it is required by law to administer is patently unreasonable.

17. Agencies should be encouraged to intervene to support their jurisdiction when it is challenged in judicial review proceedings.

CHAPTER THREE

A Procedural Framework

The policy that guides an agency's decisions is also shaped by a number of less formal, non-institutional influences, such as agency members' background, experience, education, outlook, political philosophy, past and present associations, informal relationships with other branches of government and with those whose affairs they administer. Through process and procedural requirements, law attempts to structure, formalize or eliminate these influences. Rules respecting notice, hearings, bias, the communication of information, and the providing of access to information have been developed to minimize the impact of considerations that are viewed as providing irrelevant grounds on which to base a decision.

Rules of procedure have another, broader purpose: to help agencies get on with the job as efficiently as possible; to gather information and to use it effectively in making decisions that pay due respect to public and private interests. In this respect, it could be said that the existing administrative structures function reasonably well. Every day, thousands of decisions are made, most often satisfactorily. Agencies have, by and large, made commendable strides in developing procedures that respond to the concerns of participants. They have been inspired by legal notions of process, such as natural justice and fairness, which have been imported into administrative procedure over the years and continue to evolve in administrative law doctrine (see *Nicholson*, [1979] 1 S.C.R. 311). These notions have also found expression in statutes such as the *Inquiries Act*, sections 12 and 13 and the *Canadian Bill of Rights*, section 2. They reflect values about legal process that have become part of our political fabric, witnessed for example, by the entrenchment in section 7 of the *Canadian Charter of Rights and Freedoms*, of the right to "fundamental justice" whenever administrative action might jeopardize the right to life, liberty or security of the person (see Garant, 1982: Chap. 9; Manning, 1983: 255-74).

However, the present structure lacks any sense of individual agencies functioning as part of an administrative *system*. When one compares particularized rules, there is little cohesiveness (see Beetz, 1965: 249-51). No compendium of rules or statement of procedural guidelines applies to all agencies. Some agencies (for example, the CRTC) are bound to an extent by procedural requirements set out in their enabling Acts, but most (for example, the Atomic Energy Control Board and the National Parole Board) have considerable procedural latitude. Some agencies have formal rules of procedure; some do not. The sophistication of these rules varies inordinately. Some "rules" are informal guidelines (for example, the Tariff Board). Sometimes, but not always, the "rules" can be varied (for example, CRTC rule 8); sometimes, but not always, the

"guidelines" are "enforced" (see Slayton and Quinn, 1981: 39, 52-3). Some rules are very elaborate (as in the case of the Canadian Transport Commission); some are skeletal (for example, the Tariff Board). They can be more or less accessible. Some are published; some are part of "manuals" for the use of decision makers only. Some are written in clear, simple language; some are arcane and read like incantations. Rules offer a variety of ways of accomplishing essentially the same tasks. Approaches, powers or mechanisms which are afforded in one context and would prove useful in another are not extended to the latter (see Slayton and Quinn, 1981: 39, 48-50). There are differences in legislative expression of similar concepts and powers. In short, if one steps away from individual agencies to look at the issue from the perspective of the whole system, federal administrative procedure is a veritable jungle or, as has been said of another area of law, a "large structure, which is beautifully made in parts but entirely lacking in overall design" (see Gibson, 1984: 10).

The same is true of the exercise of administrative powers, such as those to compel witnesses to appear, to control proceedings and to delegate various responsibilities. Again agency powers differ widely, for no apparent reason. Whatever uniformity does exist usually is the result of the incorporation by reference of blanket powers, such as those of a commissioner under Part I of the *Inquiries Act*, a method which we had already criticized in Working Paper 25 (see LRCC, 1980: Rec. 3.10).

A few illustrations are in order to show the levels of irrationality which these variations can reach (see LRCC, 1980: 56-7; and generally, Picher, 1976). There is, first, the concept of "court of record". Some regulatory agencies are courts of record; some adjudicative agencies are not. Some or all of the powers attached to this status are granted under half a dozen or more different terminologies. Identical terminologies have been interpreted differently for different agencies; different terminologies have been said to carry identical consequences for different agencies. The uncertainty surrounding the consequences of variations in the formulation of the concept is compounded by the fact that no one really knows what it means. Another case in point: the Canada Labour Relations Board obtained in 1978 an amendment to its privative clause, which was not extended to the Public Service Staff Relations Board, although both agencies exercise similar functions in similar areas of activity (see LRCC, 1980: 59-60). Furthermore, rights of appeal from the Tariff Board to the Federal Court vary from one statute to another (see Slayton and Quinn, 1981: 23). Under the *Customs Act*, section 48, and the *Special Import Measures Act*, section 62, the appeal is as of right, except in the case of interveners, who can get leave to appeal only if they show a substantial interest. Under the *Excise Tax Act*, section 60, and the *Petroleum Administration Act*, section 65.18, appeal is always by leave, but nothing requires interveners to show a substantial interest.

The discrepancies we have just pointed out exist in statutes and in case-law. They have surfaced in spite of a centralized legislative drafting process, and of a single system of courts. One can imagine how much more startling the variations might be with rules that are written by different agencies at different points in time. Comparing the *C.R.T.C. Telecommunications Rules of Procedure* and the *Canadian Transport Commission General Rules* is particularly instructive in this respect, because the latter are largely inspired by

the former and because both apply in broadly similar areas of regulation. The preamble to the CRTC rules contains detailed objectives; the CTC rules do not, although the CTC was urged to include some (see Janisch, 1983: 175). The CRTC forms are much more detailed and comprehensive. There are interesting variations in drafting. For example, CTC rule 15(1) provides for disclosure of information "[s]ubject to statutory provisions against public disclosure"; CRTC rule 19(1) does not contain that proviso, although the advisability of including it was considered by the CRTC. Yet, both rules were written to mesh with the same statutory provision (see Janisch, 1983: endnote 18). One can register with the CRTC as an "interested party" regarding certain categories of hearings, so as to be systematically notified when they are to be held (rule 7); the CTC rules do not provide for this opportunity. CRTC rule 39(1) provides for notice of hearings in newspapers; the CTC rules do not. CTC rule 15(11) allows public disclosure of a document in relation to which there has been a claim for confidentiality only if such disclosure is proven to be "relevant"; CRTC rule 19(10) allows disclosure if it is in "the public interest". Both the CRTC (rules 17 and 18) and the CTC (rules 30 and 31) provide for interrogatories, but in significantly different language. For example, only CRTC rule 18(3) provides that "where an interrogatory is directed to a party in one of the official languages, the party shall provide its response in the same official language". CTC rule 13(4) extends time limitations that expire or fall "on a Saturday or a holiday"; CRTC rule 5 does so if the deadline expires or falls "on a Saturday, *a Sunday* or a holiday" [Emphasis added]. Finally, building on exactly the same statutory authority as the CTC, the CRTC has developed sophisticated rules governing costs for interveners in hearings in a similar area of regulation; the CTC has refused to deal with the issue (see Janisch, 1983: 177).

Some of these differences are the result of federal agencies forming a heterogeneous group. They have particularized objectives and functions that often require specialized approaches to problem solving and decision making. Our agency studies have borne out that some differences may be significant Both Working Paper 25 (LRCC, 1980: Chap. 2) and this Report recognize this. However, heterogeneity can only carry one so far as a justification for existing discrepancies. We doubt that the current functional or institutional differences within the system are significant enough to support such a wide range of variations in procedure. Rather, the situation exists because there is neither the incentive, nor the mechanism, to eliminate unnecessary differences. Even the processes for establishing rules of procedure vary significantly. This certainly was the case with the CTC and the CRTC despite the fact that interested parties likely had as much at stake in the formulation of one set of rules as in the other (see Janisch, 1983: 174-5).

Not everyone will agree that to eliminate even unnecessary procedural differences from agency to agency is an objective worth pursuing. After all, individual agencies do seem to operate at an acceptable level, if one leaves aside the global perspective. Indeed, some may dispute the very notion of "system" which we stress. Our view, however, is that unnecessary variations do create difficulties. Discrepancies in time limitations in the judicial system are known to [TRANSLATION] "unduly complicate life and lead to absurd situations" (see Décary, 1984). The same is true in the world of administration. Agencies lack a common basis upon which to communicate among themselves. The chances of

generating a common core of decisions that might shrink the amount of needlessly repetitious case-law are reduced. Judicial interpretations are of limited use. Agency rules of procedure are really accessible only to specialized counsel, not to the general practitioner, and even less to the interested public.

A law that encourages unnecessary differences is not only irrational; it threatens to erode the values that should underlie good administrative decision making. It can result in reduced *efficiency* (increased time taken to draft rules and to prepare cases, higher costs, time loss due to "breaking in" non-specialists, repetitious case-law resulting from a lack of "cross-fertilization"); reduced *fairness* (inconsistent treatment in the exercise of similar functions with similar clienteles, even in the face of similar or identical rules and decreased access); reduced *accountability* (lack of a benchmark, ability to "hide in the pack" and neglect to correct an anomalous situation, impossibility to evaluate rules against those of another agency or against the case-law relating to the rules of another agency); and reduced *comprehensibility* (increased uncertainty as to the meaning of rules, confusion due to insignificant variations in language).

Although courts have tried to put some sense of structure into administrative procedure, their capacity to do so is limited. Courts only intervene in a minute proportion of cases. Their decisions often do not have a wide impact, even on the affected agency (see Angus, 1974: 183-4). Indeed, these decisions are often viewed as impediments by agencies, resulting sometimes in attempts to bypass them (see Harlow, 1976). Furthermore, the flexibility of the concepts of natural justice and fairness does not foster visible or predictable administrative procedures or promote consistency within the system as a whole. Neither does the fact that courts have been known to put different interpretations on similar or identical rules. Indeed, it could be thought, looking at the case-law, that agencies sharing similar functions and similar clienteles are unexpectedly treated differently, for reasons that seem to have more to do with history or case-law, than with reason or function.

There is a further problem. Much judicial interpretation tends to be biased towards what are sometimes called "lawyers' values". The Charter likely will reinforce this tendency. Yet, these are not the sole values against which administrative procedures must be assessed (see Baldwin and Hawkins, 1984: 580). Ours is a society with limited resources. What lawyers see as fairness may have a cost which society as a whole is not prepared to bear. The increased risk of judicialization of the administrative process must always be kept in mind, particularly when one pauses to remind oneself that administrative agencies are not courts, that their responsibilities as decision makers go beyond dispute resolution to embrace policy development and implementation.

Agencies are conscious of the difficulties we have described, although, understandably, they view with some concern the prospect of dealing with them through systemic reform. Despite their reservations, we sense that agency members perceive a need for mechanisms that will improve the sharing of information, techniques and experiences, and will heighten their capacity to view their roles within a larger framework. There appears to be a widely shared feeling that the system could be improved to provide a

better blend of efficiency and fairness which, ultimately, could reduce the overall cost and intrusiveness of agency action while promoting a greater sense of satisfaction, both in those who have to deal with agencies, and in the public.

It is largely in response to the absence of visible and organized structure in current federal administrative procedure that we outline, in this Chapter, a proposal for a more highly integrated procedural framework for agency decision making. This framework would give better expression to the values presented earlier in this Report, and, in particular, would allow "fairness" and "fundamental justice" to blend more systematically with the requirements of effectiveness, economy and efficiency. It would use law to help ensure that only necessary differences are reflected in agency procedures. And it would encourage agency autonomy not only in individual decisions, but in the broader policy role we earlier suggested that agencies should fulfil.

I. Standards

Organizing a new procedural framework for administrative agencies requires more than informal encouragement from organizations such as our own, more than the evolution of common practices through the exchange of ideas and experiences from agency to agency, and more than the application of standards by courts on a case-by-case basis. Although each of these elements can influence reform, there is a further element that only Parliament can provide.

Parliament should enunciate in legislation basic process standards that would apply to all independent administrative agencies. These standards would not be rules of procedure in themselves. Rather, they would be the foundation upon which agency rules would be based. Particularized procedures must reflect the nature of the mandate assigned to each agency. Therefore, agencies must play a dominant role in transforming process standards into rules of procedure (see section II, Chapter Three, of this Report).

We think that legislating standards would have a significant educational impact upon agencies. They are creatures of statute and look more to Parliament than to Cabinet or to courts, as their source of authority and direction. Encouraging and providing the motivation for agencies to rethink their attitudes and approaches to decision making should serve to heighten their understanding of the values underlying administration, and of the relevance of such values when addressing common problems facing administrators. In this way, for example, a new procedural framework could inspire renewed emphasis on training.[62]

62. The usefulness of members' training programs as a supplement to formal procedural safeguards must be realized (see LRCC, 1980: 170-2; Law Reform Commission of British Columbia, 1974: 8; Willis, 1968: 353; Royal Commission Inquiry ..., 1968: 5).

A legislated framework of basic standards would also have educational value for the interested public. It would provide citizens with a statement of standards they could expect agencies to meet (see Royal Commission Inquiry ..., 1968: 211). Fundamental principles would be consolidated and given new vitality and visibility. In this sense, a legislated framework would serve a symbolic function, reminding citizens that agencies are not authorities unto themselves, but must adhere to certain standards.

Legislating standards is particularly important, we think, in view of the *Canadian Charter of Rights and Freedoms*. The Charter marks an important watershed in Canadian law. Its impact on the administrative process is still a matter of conjecture. However, there is no question that it dramatizes the importance of procedure in any governmental decision-making process and invites the expression of its values in the procedures that apply whenever private rights are affected by statutory decision makers (see Duplé, 1984: 105-21; Manson, 1984: 155-7). Section 7, which we have already referred to, is a prime example.

There is, however, a risk in leaving administrative process and procedure to be developed primarily through the judicial enforcement of general constitutional concepts such as "fundamental justice". The Charter seeks primarily to protect individual rights. Due regard must also be paid to other values we have identified that, while important to public administration, do not have constitutional recognition. Parliament is in a better position than the courts to ensure that this occurs. By legislating standards that reflect all the values that agency procedures should address, Parliament can play a significant role in adapting Charter requirements to the needs of a well-functioning administrative system. The absence of legislation may result in "lawyers' values" being afforded too much attention.

What follows is a catalogue of basic process standards that we think should apply to independent statutory decision makers.[63] They are founded to a large extent upon existing concepts. They also reflect our preferred direction with respect to issues where agencies and courts are presently struggling to resolve competing interests. They emphasize functions to be served, rather than methods to be employed; as such, they should be sufficiently flexible to accommodate a range of procedural needs. They should be broadly applicable not only to agency decision making, in the strict legal sense, but also to substantive regulation and rule making. This catalogue is not the final word on how these standards should be expressed in legislative form. Rather, it is in the nature of groundwork for more detailed discussion and recommendations to be developed in forthcoming studies.

63. These are largely inspired from Robardet, 1985.

A. Ensuring Reasonable and Adequate Notice

Agencies should ensure that all interested persons are given reasonable and adequate notice of agency proceedings. "Reasonable and adequate notice" includes timely notice that a proceeding will take place, information about the nature of the proceeding, the time and place of any "hearing" or the appropriate time for written comment, and a fair indication of the issues to be raised.[64] An "interested person"[65] may be someone who has invoked the jurisdiction of the agency, someone who is otherwise a participant in proceedings that are under way, or someone who is not yet involved in the proceedings but should be made aware of them, in view of their potential impact upon his interests, or in view of what he can contribute to the proceedings. In this sense, the question "Who is 'interested'?" is not answered simply by asking who may be affected by the decision (which goes to the issue of fairness). Subsidiary questions must also be asked: Who has useful information and insight to contribute to the decision? Will a person's participation help the agency to fulfil its mandate, or will it burden it?[66]

Notice need not necessarily emanate from the agency, but the agency should have the duty to ensure that notice is given: to do so, the agency might impose this obligation on the person invoking its jurisdiction, as is done in proceedings before civil courts. What constitutes "reasonable and adequate notice" will vary depending on the type of proceeding and the issues at stake. A person aggrieved by the determination of an issue directly affecting his rights should receive a personalized notice. Notice of rule making, on the other hand, might well take the form of a general public announcement, although in some cases a person entitled to participate in a rule-making proceeding may also be sufficiently identifiable and sufficiently affected by its outcome to be entitled to receive a personalized notice.[67]

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64. See *Canadian Radio-television and Telecommunications Commission*, [1982] 1 S.C.R. 530; *Confederation Broadcasting*, [1971] S.C.R. 906. Thus, a high level of particularity may be demanded. See *Frias* (1974), 2 C.F. 306 (C.A.); *Saskatchewan Tele-Communications*, [1980] 1 F.C. 505 (T.D.); *Landreville*, [1977] 2 F.C. 726 (T.D.), p. 757 (rejection of the concept of an implicit notice of an accusation of perjury), p. 758 (insufficient nature of a notice in general terms). See also *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, s. 8.

65. "An interested party may be a licence applicant, a licensee, one or more members of the public, or a special interest group." Atomic Energy Control Board Policy and Procedures on Representations and Appearances, Regulatory Document R-76, May 17, 1983, p. 1.

66. See LRCC, 1980: 125-6. The "right to be heard" is justified in part by the need to reach the "right" decision (see *Capital Cable Co-operative*, [1976] 2 F.C. 627 (T.D.)). Thus, this right can help, rather than hinder, administrative efficiency (see *Parkins* (1978), 19 O.R. (2d) 473 (C.A.)).

67. For instance, pay TV licensees could be entitled to individual notice regarding a change in regulations because licensees are easily identifiable and small in number. See also *Wiswell*, [1965] S.C.R. 512, which held that notice had to be given to affected property owners before a zoning by-law dealing with a particular piece of land could be amended (see also Evans *et al.*, 1980: 133 *et seq.*; Garant, 1985: 719-25).

B. Allowing for the Communication of Information and Views

Those who are sufficiently interested to be entitled to receive notice of agency proceedings must be accorded standing as "participants" in administrative proceedings, if they so choose. Such participants should have a reasonable opportunity to communicate information and views to the agency, and to comment on submissions of other participants. As long as reasonable consideration is given to confidentiality, information provided by a participant which may influence the agency's decision should be subject to the critical examination of all participants.[68]

This does not imply that agencies must hold "hearings", in the formal sense, nor that there would always be an opportunity to make oral presentations. Different situations will require different choices about who should participate and what the scope and modes of participation should be. Much will depend on the kind of issues involved.[69] Moreover, our standard does not imply that each participant should necessarily have an equal range of opportunities to participate.[70] A consolidation of interventions may well be warranted where the subject-matter and character of the proceedings lend themselves to such an approach (see Johnston, 1980: 57-60). To encourage agencies to experiment with innovative methods of obtaining information and views from interested persons, we have couched the standard in language emphasizing its function, rather than dictating a particular method.[71]

For example, the task of collecting information sometimes may have to be delegated. Not all agencies may desire or need this authority. However, as time, geography and case-loads impose increased constraints on agency members, this may well be an option that many will wish to consider. In its most obvious form, this would involve the delegation of authority to hold hearings before the agency makes its decision. Several statutes presently provide for this,[72] and practices have emerged under which panels of members, single members, staff or external hearing officers preside over hearings where facts and views to be taken into account by the agency are presented. There are other situations in

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68. See *Innisfil*, [1981] 2 S.C.R. 145, reversing (1978), 23 O.R. (2d) 147 (C.A.), pp. 166-7; *Attorney General of Manitoba*, [1974] 2 F.C. 502 (T.D.), p. 518; *London Cable*, [1976] 2 F.C. 621 (C.A.).

69. See *Komo*, [1968] S.C.R. 172, p. 176; *Jordon*, [1980] 1 F.C. 809 (C.A.); *Downing and Graydon* (1979), 92 D.L.R. (3d) 355 (Ont. C.A.).

70. See *Gateway Packers*, [1971] F.C. 359 (C.A.), pp. 377-8; *Seafarers*, [1976] 2 F.C. 369 (C.A.), pp. 375-6.

71. See LRCC, 1980: 113-4, 126-31. See also, for example, *Redmond*, [1981] 2 F.C. 75 (C.A.) which held that it was within the authority of the Public Service Commission to use telephone conversations with candidates as a means of determining their qualifications.

72. On the delegation of agency powers see, for example, Nuclear Damage Claims Commission, *Nuclear Liability Act*, s. 24(4): variability of quorum for hearings; Pilotage Authority, *Pilotage Act*, s. 11(2): general or specific delegation to any person; PSSRB, *Public Service Staff Relations Act*, s. 18.1: delegation to the Vice Chairman and any Deputy Chairman; CRTC *Canadian Radio-television and Telecommunications Commission Act*, s. 13: delegation to standing or special committees; and 14(3): delegation to a commissioner; *Broadcasting Act*, s. 19(4): hearing held by two or more members; CTC, *National Transportation Act*, ss. 19(1), 20, 24(1) and (3); CLRB, *Canada Labour Code*, s. 117.

which the delegate may exercise the power of decision, subject to a review by the agency itself. Each model raises separate concerns about how and by whom the effective decision is made, whether the element of collegiality is being compromised and whether sufficient safeguards are being extended to participants (see LRCC, 1980: 132-134).[73] We now have a study under way designed to assist us to make recommendations as to the feasibility and scope of such delegated authority.

The scope of opportunity afforded to interested persons to present information and views is also conditioned by the rules of evidence adopted within an agency. Some, such as the Canada Labour Relations Board, adhere as closely as possible to the legal rules of evidence (see Kelleher, 1980: 50); others, like the CRTC and the National Energy Board, adopt a more flexible posture (see Johnston, 1980: 27, 39, 54-5; Lucas and Bell, 1977; 61). We have yet to consider the feasibility of a broadly applicable set of evidentiary rules or guidelines for federal administrative agencies, although this is a matter that begs integration into the procedural framework we are promoting. For the moment, the only standard we propose is an extremely general one. Because we believe that many of the rules of evidence that apply in court proceedings are not suited to an agency's work, we opt for a standard that would allow them wide evidentiary latitude. *Except where otherwise prescribed by statute, an agency should not have to follow the rules of evidence that apply in courts of law, other than the rules of evidentiary privilege* (see the Alberta *Administrative Procedures Act*, s. 9(b); the Ontario *Statutory Powers Procedure Act*, s. 15; also the Law Reform Commission of British Columbia, 1974: 52-3). *Rules of evidence should, accordingly, be developed as incidents of administrative procedure*, within the rule-making framework developed later in this Chapter. Model rules of evidence, in the format which we later recommend (p. 68), would prove particularly useful.

C. Providing Procedural Information and Assistance

Providing a reasonable opportunity to participate implies that *an agency must provide interested persons with reasonable access to information about agency procedures*. In large part this could be accomplished through a requirement that agencies formally adopt and publish their procedures. However, not all procedures are capable of being formalized: there will always be a need for informal or *ad hoc* procedures to bridge gaps or to handle isolated situations. Also, an agency will necessarily place interpretive glosses upon its formal rules. To assist persons to comply with agency procedures, *agencies should supplement formal rules with oral or written elaborations of informal procedural requirements or interpretive rulings, and should provide assistance in the completion of forms*. These and similar services could prove helpful to participants without imposing an undue burden on agency staff.[74]

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73. The courts do not look favourably upon the "delegation" of powers of decision to persons not present at a hearing (see *Mason* (1983), 7 C.C.C. (3d) 426 (Ont. H.C.); *O'Brien*, F.C. Nov. 23/84 (unreported); and *Ford*, F.C. Nov. 23/84 (unreported)).

74. See LRCC, 1980: Rec. 5.2 to 5.4; Economic Council of Canada, 1981: Rec. 60. See also Slayton and Quinn, 1981: 41; Issalys, 1979: 237; Issalys and Watkins, 1977: 36; and Kelleher, 1980: 29. Such assistance can also be required by statute (see, for example the *Social Aid Act* (Qué.), s. 36).

We do not as yet contemplate agency personnel making applications on behalf of persons, or acting in an advisory capacity. While that level of assistance might seem appropriate in particular cases, it can raise difficult legal problems. Would the agency be liable if a mistake were made? (See Pelletier, 1982: 366-392; *Couture*, [1972] 2 F.C. 1137 (T.D.).) Could a charge of bias arise as a result of assistance having been given by agency staff members? The agency, in providing assistance to one participant, may appear to be compromising its obligation of impartiality towards others.

Accordingly, we would limit agency assistance to the provision of supplementary information and other relatively minor help. More extensive or more formal assistance should be provided only if the agency's constituent Act expressly provides for this (see *contra*, LRCC, 1980: Rec. 6.5). Other forms of assistance not directly linked to agency staff may also be contemplated.[75]

D. Allowing for Professional Representation

Effective participation in an agency proceeding often requires skills that are not usually possessed by persons without special training or experience. However much we try to make agency procedures simpler and clearer, we will never succeed in eliminating this need for specialists and *initiés*. Therefore, *a participant should be allowed to employ a professional representative in a proceeding. This goes beyond the traditional "right to counsel", so as to embrace non-lawyers whose specialized abilities could be of assistance* (see the Alberta *Administrative Procedures Act*, s. 6(b); the Ontario *Statutory Powers Procedure Act*, s. 10(a); the *Canadian Bill of Rights*, s. 2(*d*); the Québec *Charter of Human Rights and Freedoms*, ss. 34, 56(1)). There may be roles that only a qualified legal professional can fulfil. For example, a lawyer is in a unique professional position to handle, in confidence, certain sensitive information placed before some agencies (see following section of this Report). In other instances, however, the role of an accountant, engineer, scientist or administrator should not be restricted to that of expert witness if carrying out a more representative role on behalf of a participant is reasonable and appropriate in the circumstances. Non-lawyers appear nearly as often as lawyers before some agencies. Customs agents handle about twenty-five per cent of the applications to the Tariff Board (see Slayton and Quinn, 1981: 41). Members of the Royal Canadian Legion often act for interested persons before the Canadian Pension Commission.

75. See LRCC, 1980: 139, on the Bureau of Pensions Advocates.

E. Access to Information

In principle, participants should have reasonable access to all information that is relevant to the decision the agency will make. Disclosure of information leads to a more open administrative process, which yields more accurate and acceptable decisions on the strength of a more informed presentation and analysis (see Carrière and Silverstone, 1976: 66; Issalys, 1979: 299-300). An open process contributes to fairness, efficiency and accountability in administrative decision making. Agencies that guard their independence must proceed openly (see Slatter, 1982: 121).

The *Access to Information Act,* already allows access to a wide range of information to the public generally. However, participants in an administrative proceeding should not have to use the procedures of the *Access to Information Act*, nor be limited to those documents which that Act requires to be made available to the general public. They should be entitled to any information that is relevant to the proceeding.[76]

Information yields enormous power in today's world, and can do harm as well as good. Certain information needs to be treated with confidentiality, but uncertainty exists about how that need can best be balanced against the need to provide access to all relevant information. Sometimes, it may be possible to provide for mandatory disclosure as a "cost" of doing business in a regulated area. However, certain information will not be forthcoming if it is not protected. The Canadian Import Tribunal (formerly the Anti-dumping Tribunal[77]), if it is to get the information it needs, must ensure that a businessman's competitive position is not jeopardized by the release of trade secrets (see Slayton, 1979: 47-8; compare Slayton and Quinn, 1981: 48-50; Franson, 1979: 34-40). The Parole Board may have to ensure that certain psychiatric information or the identity of certain character references are not disclosed, even to the person to whom the information directly pertains (see *Abel* (1980), 31 O.R. (2d) 520 (C.A.); compare Carrière and Silverstone, 1976: 106; Franson, 1979: 54). A similar problem exists when the Atomic Energy Control Board requires information raising an issue of national security.

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76. Thus, confidentiality should be regarded as the exception, not the rule (see, for example, *Magnasonic*, [1972] 2 F.C. 1239 (C.A.); *Sarco*, [1979] 1 F.C. 247 (C.A.)). Access to information is all the more justified that it affects the effectiveness of the participation and of the contribution participants can make in helping the decision maker reach the "right" decision (see *London Cable*, [1976] 2 F.C. 621 (C.A.), p. 625). On the right to challenge facts, see *Blais*, [1973] 1 F.C. 182 (C.A.), p. 183; *Tichy*, [1974] 2 F.C. 42 (C.A.). Case-law also allows parties access to documents in the agency's possession on which it intends to rely (see *Bank of Nova Scotia*, [1978] 2 F.C. 807 (C.A.), pp. 813-4). It even establishes a presumption that a document put on the record has been consulted (see *Houston* (1978), 17 O.R. (2d) 254 (Div. Ct.); also *C.R.T.C. Telecommunications Rules of Procedure*, s. 19; *Canadian Transport Commission General Rules*, s. 15(1)).
Some recent cases supporting, in principle, the notion of openness suggest nevertheless that there are a number of specific instances when not all material need be revealed (such as background papers prepared by staff for agency decision makers) which may have the practical effect of limiting this openness concept considerably (see *Toshiba*, 30 March 1984, F.C.A. (unreported); *Trans Québec* (1984), 54 N.R. 303 (F.C.A.); and *Radulesco* (1984), 55 N.R. 384 (S.C.C.); also Schultz, 1983: 14-5). The *Access to Information Act* serves a purpose that is altogether different from the disclosure requirement in agency proceedings; resort to one in order to achieve the other may prove inefficient.

77. See s. 63 of the *Special Import Measures Act*.

Simply to withhold the information from participants is not satisfactory. *It ought to be incumbent on agencies to search for innovative ways of reconciling the competing demands of confidentiality and disclosure.* The Anti-dumping Tribunal (now the Canadian Import Tribunal) developed practical ways of dealing with confidential information to permit what appears to be a workable compromise between these competing demands. This involves both the deletion of confidential aspects from documentation, and its disclosure to counsel on the condition that it will not be disclosed to the parties themselves (see Slayton and Quinn, 1981: 47-8; also Johnston, 1980: 111-3; Janisch, 1978: 76-8). While forcing counsel to use information in their clients' best interests, without sharing it with them, can subject the solicitor-client relationship to serious operational and ethical strains, it may well represent the most practical compromise.

Access to staff studies has also been resisted by some agencies as an undue intrusion into their internal operations (see Franson, 1979: 28-34; LRCC, 1980: 134-6; Janisch, 1978: 71-6; also Doern, 1976: 32-4). Some agencies rely heavily on the work of their staff, who may be responsible for collecting background information that becomes relevant in a proceeding. Many agencies worry about the effects of a disclosure requirement on staff candour. Staff studies may pertain to wider issues than the ones raised in any particular proceeding. This may raise logistical difficulties: for example, extensive censoring of staff documents may become necessary in order to sever what is relevant in one context from what is relevant in another. Staff members whose studies were placed on the record could be required to testify at hearings, and that might compromise other roles which staff play in agency proceedings. Advocates of full disclosure, on the other hand, point out that agency staff are in a unique position to influence the course of the decision. They submit that a staff study may contain information that was not elicited in the proceeding itself. That information may influence the thinking of the agency, without allowing participants the opportunity to challenge either the information or the opinions that were developed.

We think that *information and opinions contained in a staff study that are relevant to a proceeding should be made available to participants, either by allowing access to the study, or by ensuring that the information and opinions are otherwise placed on the record.* Administrative law must seek to ensure that there is no "hidden agenda", that the record discloses all essential information and issues and that there is a reasonable "window" on the agency process. We believe that agencies can accommodate themselves to a broad standard of disclosure without any undue impact on staff candour. We doubt that broader disclosure would result in inadequate documentation or "clandestine" briefings. To a great extent the problem is more one of attitude than of substance. Agencies should demand that their staff produce full, frank and accurate reports whether or not they be subject to disclosure. We think that a broadly stated legislative standard favouring disclosure would help to dissipate the lingering reluctance of some to accept the full import of an open administrative process.

Implementing such a standard would not be without its difficulties. Where the study itself was not produced, the agency would have to satisfy itself that all the relevant information and opinions had otherwise been disclosed. It would also fall upon the agency

to forward to the court, on an application for judicial review, any such study. This would allow the court to determine whether or not the relevant contents had been disclosed adequately to the parties, as was decided in the *Toshiba* case. But the judge should not be the only one to see the study. At the very least, it should be made available to counsel to ensure that a comparison of the study, the record and the reasons for decision did not reveal that the agency relied upon undisclosed information or opinions.

Documents prepared by agency staff in the course of the decisional process of the agency should not be subject to disclosure. There is a distinction, albeit a fine one, between studies that are prepared either before or during an administrative proceeding and are aimed at providing agency members with the necessary background to understand the issues that will arise in the course of the proceeding, and memoranda that are developed to assist the agency in coming to its decision.[78] An agency is entitled to professional advice and assistance in fulfilling its decision-making responsibility, and as long as no new information or opinions are introduced, there appears to be nothing more exceptionable in such a practice than in the one that allows judges the assistance of legally qualified clerks or secretaries whose memoranda are not open to public review.

A third aspect of disclosure concerns the relationships some agencies have with government departments and other agencies. This occurs frequently at the working level, involving contact among officials and private exchanges of information (see Doern, 1976: 18-9, 27-9; Doern and Phidd, 1983: Chap. 13). While this may arise outside the context of any particular proceeding, it can nonetheless influence the course an agency adopts on a given issue.

Again, there are arguments both for and against the more open disclosure of intergovernmental communications. Some who maintain the importance of such contact believe that to formalize it would simply discourage the valuable sharing of ideas and information. Others believe that an effort should be made to provide more opportunity to challenge influential views and information that may be passed through informal communications (see Janisch, 1978: 122-3). There is, however, general agreement that it would be both undesirable and impossible to circumscribe in formal rules the full range of such exchanges. Although our preference is for greater openness, we do not think that disclosure rules can deal adequately with informal communication in view of the subtle and diverse

78. The case-law has, however, been somewhat uneven on this distinction. In the *Toshiba* case, Hugessen J. did not require the disclosure of the contents of briefing books written before the hearing despite his description of non-disclosure as "a dangerous practice". In the *Trans Québec* case the court did not require the release of staff memoranda which were *probably* written after a hearing, because it was "not shown by anything in the material before the Court that such opinions or the papers containing them amounted to additional evidence or to anything more than comments or suggestions by the staff ..." (p. 308). The court did however allow that where a decision of a tribunal can be shown to have been based on staff reports to which the parties have not had access containing evidentiary material to which the parties have not had an opportunity to respond, it may be possible to make out a case for requiring that they be included in the case for review.
The most recent Supreme Court of Canada case on this point, *Radulesco*, suggests that at least in a quasi-judicial setting, a certain standard of disclosure is necessary to give real effect to the right to be heard. Lamer J. held for a unanimous court that in order to ensure that submissions are made on an informed basis, a decision maker must, prior to its decision, disclose the substance of the case against the party.

methods by which information and views can be transmitted to agencies. As one commentator noted, telephone calls cannot be legislated out of existence. *We do encourage, however, greater recognition of the desirability and propriety of agencies and departments appearing as interveners in each others' proceedings in order to have their views aired and considered openly.* While it may be difficult for agencies or departments to develop an "official" *position* to present in a rule-making proceeding, permitting officials to speak "unofficially" about the *concerns* of their agency or department would be one way of contributing to the openness we are seeking to promote.[79]

It is widely accepted today that Government cannot speak with one voice, from a single viewpoint. To reflect this in the administrative process would be a healthy admission that the difficulty in achieving co-ordination of administrative policy is in part due to the diversity of interests which such policy must accommodate.

We are again inclined to think that the adoption of a broad standard supporting a more open posture would have an impact upon attitudes. It would signal the need for improved co-operation between the affected departments and agencies, and increase the readiness to experiment with new models for participation. It is important that agencies realize the extent to which the policies they apply in making decisions are influenced by informal contacts. They should endeavour to encourage more formality in those communications which bear directly upon the substance of their decision-making responsibilities.

F. Maintaining Impartiality

Agency members must be impartial in carrying out their duties. They must be seen by the participants, and by the public, to be fair and impartial among those whose needs, rights and interests are at stake in any decision. Only where a partisan relationship or point of view is rationally demanded by a particular agency objective should Parliament consider deviating from this standard, and then only to the extent absolutely required. In this regard, we recognize that the goal of a statutory scheme may sometimes call for an explicit policy orientation on the part of those administering it.[80]

The standard of impartiality should be the same for agency rule making as for decision making. An appearance of partiality on the part of the agency when making regulations and statements that establish the policy upon which statutory decisions are to be based would impair the integrity of those decisions.

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79. An example of such contact is the intervention, in 1981, during the CTC hearings into their General Rules, of two staff and the President of the Law Reform Commission, of the Atomic Energy Control Board, of Transport Canada and of the Director of Investigation and Research under the *Combines Investigation Act*. It should be noted that the director is authorized under section 27.1 of the *Combines Investigation Act* to intervene in certain agency proceedings (see also LRCC, 1980: 111-3).

80. See *Pacific Pilotage*, [1980] 2 F.C. 54 (C.A.); *Burnbrae Farms*, [1976] 2 F.C. 217 (C.A.); *Gray*, [1977] 1 F.C. 620 (C.A.).

There are two facets to impartiality. The first relates to an agency member's conditions of office, commonly referred to as conflict-of-interest requirements. *Agency members should be free of financial interest in the affairs of those with whom they will be required to deal.* To some extent, this is a requirement under existing law. The enabling Acts of certain agencies contain specific conflict-of-interest provisions (see *National Energy Board Act*, s. 3(5); *National Transportation Act*, s. 9). As well, some appointees are covered by conflict-of-interest guidelines issued by the Governor in Council (see Public Servants Conflict of Interest Guidelines). Others, however, are exempt from those guidelines, which do not apply to agencies having a "quasi-judicial" status.[81]

Conflict-of-interest rules in the public sector have recently been reviewed by the Task Force on Conflict of Interest established by former Prime Minister Trudeau. The Task Force report (see Task Force on Conflict of Interest, 1984) recommends that "quasi-judicial" agencies continue to be exempt from conflict-of-interest rules recommended for the entire federal public sector. Special rules, based upon the general rules but tailored to the requirements of each agency, would be developed for incorporation in each enabling Act. A few observations are in order here.

First, the Task Force uses the term "quasi-judicial" agencies. We consider this categorization to be overly restrictive. Independent administrative agencies exercising statutory decision-making functions share common characteristics and should be subject to a common regime. A common approach to conflict of interest should be adopted for all agencies sharing similar characteristics to those identified in Appendix A. As a corollary, *whatever policy is adopted in relation to conflict-of-interest rules for independent administrative agencies should be integrated into a general procedural framework developed for this class of government organism.*

Second, we agree with the Task Force that, as a general approach, *conflict-of-interest rules for independent administrative agencies should require divestment. In our opinion, a member should be required to divest, at the earliest reasonable opportunity after being appointed, all financial interests in any matter in respect of which the agency may reasonably be expected to make a decision.* The rule should prohibit the voluntary acquisition of such interests after appointment, and should require divestment, at the earliest reasonable time, of interests that are acquired through gift or inheritance (see *National Transportation Act*, s. 9(2)).

Third, *we are skeptical of allowing members to comply with conflict-of-interest rules through trust arrangements.* A frozen trust, a blind trust or a retention trust cannot adequately conceal holdings that are placed in it for the member's benefit. Even a "blind" trust only conceals from the member subsequently acquired conflicting interests, not those that exist at the time the trust is created. We recognize the dilemma. A strict divestment rule may discourage some from accepting membership in an agency. On the other hand, we question whether any other arrangement promotes an adequate level of confidence in

81. These appointees are generally covered by the *Judges Act*. Several agencies (for example, the Canadian Egg Marketing Agency and the Canadian Human Rights Commission) have adopted their own guidelines.

the administrative system. To us, divestment can be made more palatable if it is required only in respect of those assets that relate to the area in which the agency has to play a role.

Fourth, eligibility for appointment should not depend on the divestment of assets by spouses or close relatives. However, we believe that conflict-of-interest rules should account for these situations. *An agency member who is aware that a spouse or close relative has a financial interest in any matter in respect of which the agency may reasonably be expected to make a decision, should be required to publicly disclose that fact.* That member could then be required to withdraw from any file that gave rise to a conflict.

Fifth, a breach of conflict-of-interest requirements should not be merely a matter between Cabinet, as the appointing authority, and the appointee. *The rules must be enforceable judicially at the instance of any person who is sufficiently interested to be accorded standing in a court of law.* However, violation of the rules should not vitiate all decisions made by the agency during the period the member unlawfully holds office, many of which would not have been influenced by the unlawful conflict. Decisions should only be challengeable on a case-by-case basis where bias or an apprehension of bias could be established to have existed because of the conflict.

A second facet of impartiality requires that *no agency member sit in a proceeding in which he is interested, or is perceived to be interested, financially, personally or otherwise.* This common law rule against bias or apprehension of bias has been applied for many years to the adjudicative functions of administrative agencies (see Pépin and Ouellette, 1982: 252-6; de Smith, 1980: Chap. 5; Garant, 1985: Chap. 16). In spite of the difficulties of application that are raised because of the ongoing relationships that often develop between agencies and those with whom they deal, the Supreme Court of Canada has emphasized that independent administrative agencies must follow the highest standards of impartiality when performing their responsibilities (see *Committee for Justice*, [1978] 1 S.C.R. 369). Violation of this rule constitutes a basis for attacking the validity of an agency proceeding on jurisdictional grounds.

This rule should continue to be followed. It is an appropriate standard to bind independent administrative agencies that exercise statutory decision-making responsibilities. It demands full disclosure by the member, in the context of a proceeding, of any circumstances that could give rise to a reasonable apprehension of bias. Moreover, the member should withdraw unless the participants consent to his continuing to hear the case and he is not otherwise in violation of a conflict-of-interest rule.[82] Provision should be made for the replacement of the member who steps down, and for the appointment

82. The *Model State Administrative Procedure Act* (U.S.), s. 4-202(b) and (c), provides that a person serving as a presiding officer is subject to disqualification for bias, and provides that any party may petition for the disqualification of such a person (see also, for example, *National Transportation Act*, s. 8). On the possibility of participants consenting to the presence of the "biased" member, see Evans, 1980: 275-6.

of *ad hoc* members in those circumstances where withdrawal would reduce agency membership below the quorum required for the proceeding in question.[83] The rule against bias should not serve as an instrument of delay.

G. Giving Reasons for Decisions

Requiring an agency to give reasons for each decision has merit. It encourages careful thought about the facts, the issues and the effects of a decision. It requires the decision to be congruent with the record, and not based on extraneous matters. In this way it increases the appearance of justice in the process. It can also assist in the elaboration of agency policy, in the promotion of coherence and consistency, and in the identification of legislative or policy difficulties. It can facilitate the exercise of rights of review or appeal that may be available to a participant (see *Wrights'*, [1947] A.C. 109, p. 123; *Taabea*, [1980] 2 F.C. 316 (T.D.)), and provides an important basis upon which to realize parliamentary accountability (see Slatter, 1982: 123-4). Overall, it gives greater visibility to the approach the agency takes to its mandate.

Notwithstanding these advantages, requiring reasons in every case could prove to be impracticable.[84] It could, for example, slow down the rate at which agency business is dispatched. Our concern about this is reflected in Report 14 (see LRCC, 1980a: Rec. 4.3), in which we recommended that failure to reach a decision and unreasonable delay in reaching a decision be grounds for judicial review.

Although we encourage all administrative decision makers to give recorded reasons wherever feasible, we think that a legislated procedural standard should be less ambitious. We would require that *reasons for decision be given whenever the decision amounts to a total or partial denial of a requested action,*[85] *or is otherwise adverse to the interests of a participant.*[86]

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83. See *National Transportation Act*, s. 8. This accords with paragraph 21(2)(*c*) of the *Interpretation Act*, and with the doctrine of necessity (see for example, *Caccamo*, [1978] 1 F.C. 366 (C.A.)).

84. See Davis, 1976: 395-7. See also the *Macdonald* case ([1977] 2 S.C.R. 665, p. 672), where the Supreme Court held that the volume of criminal cases made it impractical to require reasons for decision in all cases.
Note that the giving of reasons is not a strict legal requirement of the common law (see *Macdonald*, [1977] 2 S.C.R. 665; *Canadian Arsenals*, [1979] 2 F.C. 393 (C.A.), pp. 399-400; *Gaming Board*, [1970] 2 Q.B. 417, p. 431). See Issalys and Watkins, 1977: 256-7 for a short discussion of the efficacy of standardized forms. But note that in his dissent in the *Proulx* case ([1978] 2 F.C. 133 (C.A.), pp. 142-6), Le Dain J. noted that reasons must be more than summary.

85. See, for example, the American *Administrative Procedure Act*, s. 555(e) (prompt notice to be given of the total or partial denial of a request, accompanied by a brief statement of the grounds for denial, except in affirming a prior denial or when the denial is self-explanatory).

86. See the Alberta *Administrative Procedures Act*, s. 8 (written reasons given to each party when exercise of statutory power adversely affects the rights of a party).

We reject the approach that would require agencies to provide reasons only upon request (see *Tribunals and Inquiries Act* (U.K.), s. 12(1); *Administrative Decisions (Judicial Review) Act* (Aust.), s. 13(1); *Statutory Powers Procedure Act* (Ont.), s. 17). We think that, as a general rule, better decisions are made if reasons are developed as part of the decision-making exercise (see Committee on Administrative Tribunals ..., 1957: para. 98). Allowing reasons to be provided on request encourages *post hoc* rationalizing in the place of due consideration of the issues. It can also interfere with the orderly unfolding of the review process, as was described in Report 18 (LRCC, 1982a). That Report addressed a situation in which reasons, required by law to be issued upon request by the Immigration Appeal Board, were not usually produced until after the period for filing an application for appeal had elapsed. Although in that context we recommended that the running of the limitation period for launching an appeal be postponed until the reasons were given, we signaled a need to look at the larger problem as well as our intent to return to it in the context of this Report. Our preference, in the wider context, is for a standard that would require, whenever there is duty to issue reasons, that the agency issue them simultaneously with the decision, not after a request for supporting reasons has been made.

Considerable pressure is evident today for reasons that meet a standard of "adequacy". Although we share the desire to promote more cogent, better thought out and better expressed reasons that satisfactorily address the salient issues, we are reluctant to introduce into the law the uncertainty and confusion that would accompany the use of an "adequacy" test. The "adequacy" or "inadequacy" of reasons presently influences the disposition of appeals and review.[87] Arguments should focus on the substance of the issue before the agency, and on the adequacy of the agency's *decision*, rather than on the question whether the *reasons* themselves conform to a prescribed standard of adequacy. We think that the institution of a standard requiring reasons will of itself help to bring about reasons that are adequate.

H. Providing for Reconsideration and Review

Although the "authoritativeness" of decision making, which we have isolated as a value to be pursued, implies the importance of finality in agency decisions, we return to the argument that the role of independent administrative agencies is not restricted to dispute resolution. Because of their hybrid functions, and in the interests of effectiveness, economy and efficiency, most agencies require greater flexibility than courts to reopen matters through a process of reconsideration, or to develop internal appeal avenues through

87. See *Springbank* (1977), 15 O.R. (2d) 545 (Div. Ct.), pp. 546-7; *Taabea*, [1980] 2 F.C. 316 (T.D.), p. 325; *Proulx*, [1978] 2 F.C. 133 (C.A.), pp. 138-9; *Matheodakis*, [1981] 2 F.C. 813 (C.A.). These cases establish that reasons, even where succinct, must be clear as they are used to determine the grounds for the decision as well as its rational character. Thus, the giving of reasons is linked to the adequacy of the decision itself.

which issues can be reviewed without the agency losing control over the subject-matter.[88] It becomes particularly important "to give the Board a chance to correct its own mistakes" (see Weiler, 1980: 115) where agency decision making is decentralized, in the sense that single members or panels are making decisions for the agency as a whole (see Janisch, 1978: 92-3; Johnston, 1980: 78; Issalys, 1979: 310-1; Kelleher, 1980: 57). The problem is compounded where the agency has a heavy case-load. The authority to reconsider and to review may be an indispensable element of a program to achieve reasonable consistency in decision making within the agency.

Internal review is not without its problems. The emphasis must remain on getting it right the first time. "Not every unlucky claimant has the emotional make-up to challenge an official verdict ... irrespective of the merits of the case. In any event, it is important to carry an attractive initial impression of the Board" (see Weiler, 1980: 95). Time and cost considerations also must be borne in mind, not only for the agency but for the participants. A demand for review or reconsideration may place at risk some legitimate expectations.[89] Fairness, therefore, may require that constraints be placed upon the use of this authority; for example, grounds for review should be prescribed, time-limits applied and participation rights defined (see *Canadian Transport Commission General Rules*, ss. 84-96). The implications for external review must also be taken into account. The efficiency imperatives on which reconsideration is partly based differ from the substantive fairness which full external review emphasizes. We have under way at present a study of administrative appeals that will include an examination of these and other issues. Pending completion of this study, our approach is that *administrative agencies should provide participants a reasonable opportunity for the reconsideration or review of agency decisions.*

I. Related Powers

Extending to interested persons an opportunity to participate in an effective way necessarily presupposes conferring upon agencies certain related powers. For example, an agency must have scope to organize and control its proceedings. *It must have the power to secure information that is relevant to the matter to be decided, including the power to summon witnesses and documents* (see *Statutory Powers Procedure Act* (Ont.),

88. See Wade, 1982: 225-6; Pépin and Ouellette, 1982: 222-3; *Ombudsman of Ontario and Minister of Housing of Ontario* (1980), 26 O.R. (2d) 434 (H.C.), p. 456: notion of continuing function. See also Johnston, 1980: 77-8, who thinks reconsideration is preferable to a complex process to amend decisions. Courts tend to consider as irrevocable "quasi-judicial" decisions, so as not to prejudice the rights of parties; they tend to apply the doctrine of *functus officio*, subject to an express power to revoke an action or reopen a case, and subject to allowing the correction of procedural defects going to the validity of the action, such as a breach of natural justice (see Pépin and Ouellette, 1982: 219-24; Dussault and Borgeat, 1984: 377-83; Wade, 1982: 225-8). For regulatory matters, see *Interpretation Act*, s. 35.

89. This is the reason for the existence of the doctrine of *functus* (see *Macdonald Tobacco*, [1981] 1 S.C.R. 401, pp. 408-9; *Munger*, [1964] S.C.R. 45, aff'ming [1962] B.R. 381; *Grillas*, [1972] S.C.R. 577, pp. 592-3; also *Violi*, [1965] S.C.R. 232 on the limited nature of an express power to review).

s. 12; *Administrative Procedure Act* (U.S.), s. 555). *An agency should also have the ability to maintain control over its proceedings, and to remove disruptive persons.* We would include the authority to issue orders and instructions reasonably necessary to ensure the integrity of the proceedings (see *Administrative Procedure Act* (U.S.), s. 556(c)(5)).

We would not, however, extend to any agency the power to hold a person in contempt. Nor would we be inclined to adapt our recommendations of Report 17, *Contempt of Court* (LRCC, 1982), so as to prescribe criminal penalties for offensive conduct directed towards an agency. Contempt of an independent administrative agency is best dealt with as a civil matter (see *Statutory Powers Procedure Act* (Ont.), s. 13). We think that *an agency should be authorized to initiate contempt proceedings in the Federal Court of Canada. The matter should be dealt with in the same manner as civil contempt of court.*

Finally, *an agency needs certain powers if it is to balance the participatory opportunities of diverse interests: authority to compel preliminary sessions, adjourn proceedings, make interim orders or rules, provide interim relief, adjust from an adjudicative to a rule-making format, add participants and consolidate proceedings.* These should be formally recognized as elements of statutory decision making by independent administrative agencies. Our more detailed study on procedure looks more closely at this issue, as well as at the procedural protection that individuals should be afforded as regards such powers.

II. Rules of Procedure

Legislating the standards we have just enunciated would not, alone, achieve the more highly integrated procedural framework we are looking for. To achieve this, the standards must be reflected in an agency's own rules of procedure. What follows is a recommendation for a process that would allow for the recognition and application of the standards in agency rule making and for public input into the formulation of rules that could accommodate a range of situations. In this regard, courts do not necessarily provide the ideal, or the only, decision-making models (see LRCC, 1980: Chap. 6). A court model may serve some purpose with the Immigration Appeal Board, but be unsuited to the licensing activities of the Canadian Transport Commission. Consensual or negotiatory decision-making models may be more appropriate than adjudicative ones to the resolution of certain issues (see Popper, 1983; Harter, 1982 and 1983). Often, a written process will be more appropriate than an oral one.[90] Moreover, advances in telecommunications have considerably broadened the means of communicating information. An agency should have the option of using the most efficient means as long as the demands of other relevant values are also met. And the agency should, with the consent of the participants, be free to modify its procedures even if this requires from time to time waiver by a participant of a standard that the law imposes for his protection.

90. See *Ingersoll-Rand*, [1968] S.C.R. 695; *Komo*, [1968] S.C.R. 172; *Hoffman-La Roche*, [1965] S.C.R. 575; *Civic Parking*, [1965] B.R. 657; *Labrinakos*, [1979] C.S. 979.

It is principally to accommodate the dynamic nature of administration that we think that *Parliament should refrain, wherever possible, from inserting detailed procedural requirements in agency legislation* (see Royal Commission Inquiry ..., 1968: 209-10). Parliament should concern itself with broad standards, not operational rules. Under our proposal, *the standards set by Parliament would serve as the basis for procedural rule making by agencies*. The standards would operate as guidelines for agencies to apply in exercising the kind of regulation-making authority we suggested in Chapter Two. *An agency would be encouraged to make and review periodically rules of procedure and would be required to submit them for the scrutiny of a parliamentary committee*, whether the Standing Joint Committee on Regulations and Other Statutory Instruments or another committee specially established for the purpose. Within our recommended framework, *rules of procedure would be subject to disallowance in Parliament,* just as substantive regulations or binding agency policy statements would be.

Parliament could not, however, carry out the task of day-to-day supervision of agency rule making. To provide *effective* control, there should be inserted into the rule-making process "advance warning systems" to ensure that the rules conform to the legislative design. Draft rules should be subject to notice and comment. And someone should perform an advisory and screening role. What we propose at a minimum, for the time being, would be *an advisory body to work with agencies in the development of their rules of procedure. Such a body should comprise representatives of public and private sector institutions having a direct interest in the administrative process. It also should be required, through a politically responsible official such as the Attorney General, to file with the parliamentary committee its assessment of the appropriateness of each set of agency rules submitted for consideration.* The advisory body would not have the power to veto the draft agency rules of procedure. We would hope, however, that in the long run the support of this body would be a weighty factor in the ultimate acceptance of the agency's rules.

The primary role of the legislated standards would be to guide agencies in the development of rules of procedure. And because the standards would operate only as guidelines, the conformity of agency rules to the standards would not be a matter for judicial review under the doctrine of *ultra vires*. The process we propose would, nonetheless, leave courts with a significant range of authority. It would remain to the court to determine whether agency rules infringe upon provisions in other legislation or upon constitutionally based rights; whether an agency has in fact followed its prescribed rules of procedure in dealing with a matter; or whether an agency has infringed upon the standards in aspects of proceedings *not covered* by agency rules (that is, where an agency has chosen not to adopt rules of procedure).[91] Here we think that the standards should apply directly to the agency decision-making process, a factor that may well give agencies the incentive to formalize their procedures in order to shelter their proceedings to a greater extent from judicial review.

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91. It is our hope that the new regime, once in place, would replace the common law principles relating to agency proceedings. The combination of standards and rules should deal more than adequately with the issue; the common law should not interfere in the harmonious development of the statutory scheme.

Some will disagree with our reluctance to apply the legislated standards directly to agency decision making where the agency has adopted rules of procedure through the process we have outlined. They will maintain that courts are in the best position to safeguard procedural standards. Courts have an institutional memory, are cognizant of traditional societal manners in the polity in question, and are devoted to conventional justice in individual cases. In our opinion, however, they are not in the best position to perform what we view as systemic control. We are confident that the process we recommend is a suitable compromise. It should lead to rules that reflect an appropriate blend of the values that we have stressed should underlie administrative procedure. At the same time, it should help to prevent the over-judicializing of administrative procedure that many fear might result from legislating standards.[92]

The rule-making process we have outlined would support not only agency compliance with the legislated standards, but also the better integration of agency rules of procedure into a more general procedural framework. As we said earlier, *legislative standards will not, of themselves, achieve the level of consistency in agency rules that we think is desirable*. To eliminate unnecessary diversity, *differences in rules of procedure from agency to agency should occur only where true differences in object or purpose demand special procedures* (see LRCC, 1980: Rec. 3.1; Beetz, 1965: 253; Longtin and Bouchard, 1981: 196-203). We emphasized at the beginning to this Chapter how independent administrative agencies, though different in many respects, share common attributes within the plan of Government. We have already illustrated how unnecessary differences, and the absence of visible and organized structure in the current federal administrative process, threaten to erode the values that should underlie good administrative decision making. This belief compels an evaluation of the administrative process at the general systemic level, as well as at the level of particular agencies. There are obvious cost savings to be made by Government in eliminating unnecessary procedural diversity. There are similar savings to be made by clients who may be compelled, by the nature of their pursuits, to deal with more than one agency. The rationale that supports reducing the regulatory burden on business equally supports a more integrated procedural regime.

These concerns can be supported equally by egalitarian arguments, bolstered by the spirit underlying the equality rights guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*. Procedural diversity that cannot be rationally justified will give rise to complaints that persons do not enjoy the equal protection and benefit of federal law. These complaints may not be judicially enforceable, owing to the absence of an authoritative standard by which a given rule may be measured. They nonetheless provide a compelling reason for promoting an approach to reform of procedure that places due emphasis on the increased consistency of rules.

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92. According to Pépin and Ouellette:
[TRANSLATION]
Lawyers sometimes seek too much to extend to the administrative process those rules of procedures with which they are familiar, which are those contained in the Code of Civil Procedures. However, these already overly complicated rules were not enacted with a view to meet the specific needs of administrative action, even when it involves the exercise of quasi-judicial powers. (1982: 228)

One way to help eliminate unnecessary procedural diversity would be to develop model rules that would adapt the legislated standards and powers, as required, to a range of decision-making situations: formal bipolar adjudicative proceedings; proceedings that involve numerous interveners; rule-making proceedings; inquisitorial proceedings; and file proceedings.[93] These models would incorporate the best of what currently exists in agency rules of procedure, modified as necessary to accommodate general needs. They would be developed and kept under continuous review, in close co-operation with agencies, representatives of clients and regulatees, private and public interest groups, and advisory bodies such as this Commission. They could address the whole of a decisional process, or only part thereof (for example, model rules on disclosure, cross-examination or evidence). Past experience with model Acts in Canada and the United States may help determine the best format to use. However, they would not be binding and would have no direct legal effect on agency proceedings until the agency had adopted them. *Agencies would be encouraged to borrow heavily from these models in adopting their procedures, and would bear the political onus of justifying deviations from them. While we recognize that widespread adoption of these model procedures might be, at best, a long-term objective, particularly for existing agencies who may be cautious about altering established procedures, they would, at the very least, provide an appropriate starting-point for the rules of procedure of newly created agencies.*

Finally, a more consistent procedural regime for federal administrative agencies would benefit from an institutional focus for information sharing, education, consultation, screening and co-ordination. In Working Paper 25 (LRCC, 1980: 184-6) we envisaged responsibility for this as falling to an administrative council. Such bodies exist in different forms, with differing roles, in other jurisdictions, notably the United Kingdom, Australia and the United States (see Leadbeater, 1980). A council, if it existed, would play an important role in the evolution of the procedural framework we envisage. In particular, it could assume the key advisory and screening role that we have suggested should become part of the procedural rule-making process. We expect to develop this idea further in future studies.

III. Summary and Recommendations

The approach we have recommended emphasizes, more so than other attempts to legislate a rationalized procedural framework, such as the United States' *Administrative Procedure Act* or Ontario's *Statutory Powers Procedure Act*, the importance of procedural rule making.[94] It is designed to draw into the reform process the agencies and, through

93. File proceedings or file hearings "involve the accumulation and exchange of written submissions" (see LRCC, 1980: 130), as the process leading to the making of a decision.

94. See also *Administrative Procedures Act* (Alta.); *Model State Administrative Procedure Act* drafted, approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws, New Orleans, La., Aug. 1981.

them, other public and private interest groups having a voice to contribute to the shape and content of particularized rules of procedure. In this sense, it is a specific instance of the key role we suggested in Chapter Two that agencies must play in developing administrative policy. The legislative base we propose, with its emphasis on agency rule making, is thus intended as a catalyst, rather than as a formula, for change.

Although we recognize the important responsibility of the courts to ensure that the rules of procedure followed by agencies meet Charter requirements, our proposal is based on the premise that Charter compliance is more than a judicial responsibility. Parliament and agencies have complementary roles, particularly in promoting the application of concepts such as "fundamental justice" in a manner that is sensitive to the varied facets and demands of public administration. The standards and rules developed through the process we recommend would give substance to such concepts and, in this way, provide courts with a context within which they could deal more effectively with constitutional objections on a case-by-case basis.

The proposal we have advanced is deliberately summary. It suggests an orientation, not a fully developed scheme. This should not diminish its impact. It relies as much on a co-operative attitude on the part of those concerned as on legislative direction. In this field, the law can signal, guide or encourage, but it cannot impose. No amount of legislation will achieve the changes we have in mind if those concerned do not make them their own.

Within this framework, we are carrying on more specialized work on issues of administrative procedure. This work is designed to elaborate upon the framework developed in this Report, with a view to formulating a more definitive legislative proposal. In the meantime, we report on the broad parameters of what we believe should be an evolving procedural framework for agency decision making, and recommend that:

18. Parliament should enact legislation setting out process standards that would serve as guidelines for rules of procedure to be adopted by independent administrative agencies. These standards should be developed along the following lines:

a) An agency should ensure that interested persons (that is, those whose interests may be affected or who are in a position to contribute) are given reasonable and adequate notice of its proceedings.

b) An agency should accord those who are sufficiently interested to be entitled to receive notice of a proceeding the right to participate by providing them with a reasonable opportunity to have their information and views made known to the agency, including their views on the submissions of other participants.

c) An agency should provide interested persons with reasonable access to information about agency procedures and with reasonable assistance in complying with them, for example in the completion of forms.

d) An agency should allow a participant to employ a representative whose specialized services can reasonably assist him to participate in an agency proceeding.

e) An agency should ensure the disclosure to participants of all information that is relevant to the decision the agency will make, subject to reasonable accommodation for confidentiality.

f) An agency should be impartial in carrying out its duties as a statutory decision maker. Members should be required, while holding office, to divest their conflicting financial interests, to disclose those of their spouses and close relatives, and to withdraw from individual proceedings whenever, for any reason, there is a reasonable apprehension of bias.

g) An agency should give reasons for a decision whenever the decision amounts to a total or partial denial of a requested action, or is otherwise adverse to the interests of a participant.

h) An agency should provide for the reconsideration or review of its decisions.

19. Parliament should empower agencies to give full effect to the legislated standards. This should include:

a) The power to secure information that is relevant to the matter in question, including the power to summon witnesses and documents during any proceeding at which a decision must be made.

b) The power to maintain control over its proceedings and to remove disruptive persons.

c) The power to initiate contempt proceedings in the Federal Court of Canada.

d) The power to compel preliminary sessions.

e) The power to adjourn proceedings.

f) The power to make interim orders and to provide interim relief.

g) The power to adjust from an adjudicative to a rule-making format.

h) The power to add participants.

i) The power to consolidate proceedings.

20. Except where otherwise specifically prescribed by statute, an agency should not be obliged to follow the rules of evidence that apply in courts of law, other than the rules of evidentiary privilege. Rules of evidence should be developed by agencies as incidents of administrative procedure.

21. Agencies should be encouraged to make and review periodically rules of procedure, using the legislated standards as guidelines. By the same account, Parliament should refrain, wherever possible, from inserting detailed procedural requirements in agency legislation.

22. The rules of procedure an agency adopts should be subject to scrutiny by a parliamentary committee, and to disallowance in Parliament, but not to judicial review on grounds of non-conformity with the standards.

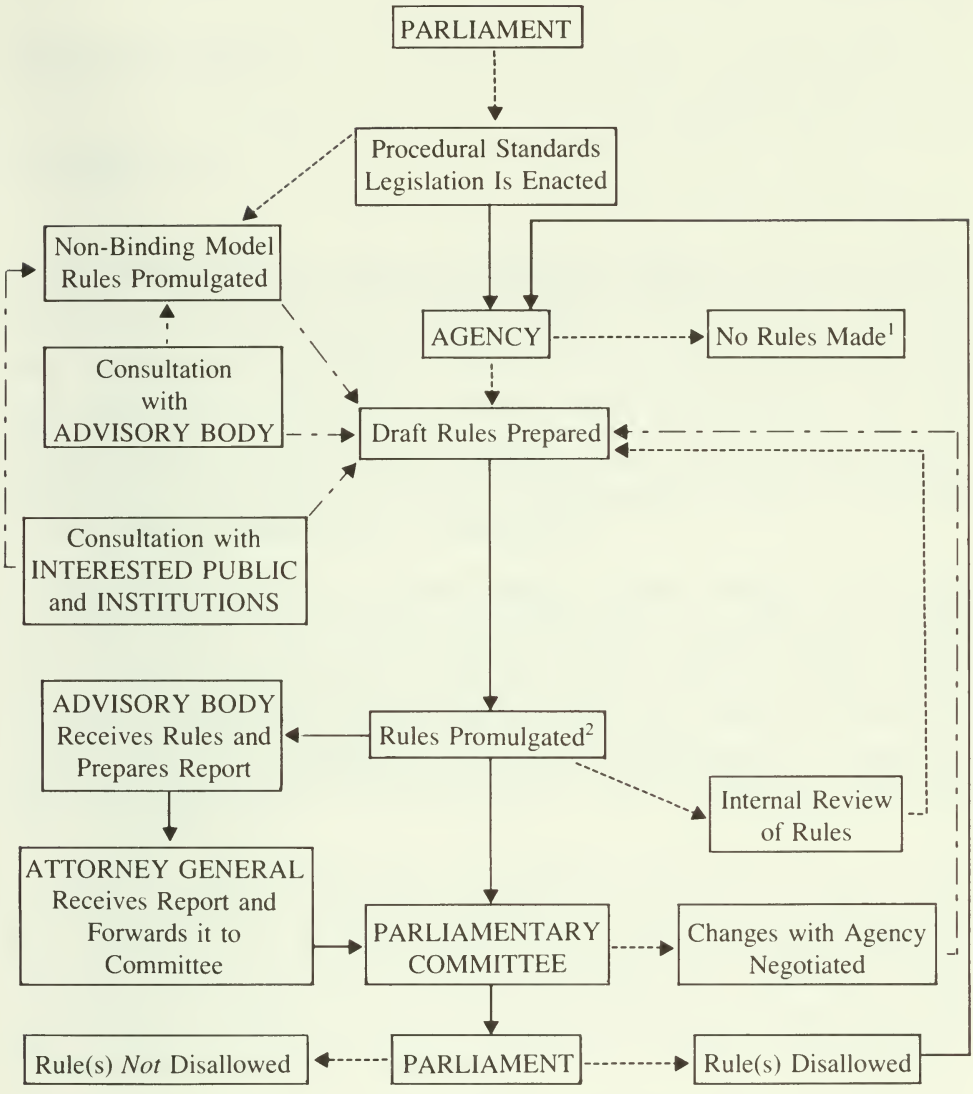
23. An advisory body comprising representatives of public and private sector institutions having an interest in the federal administrative process should be required to file with the parliamentary committee that considers a set of agency rules of procedure a report of its assessment of the appropriateness of these rules. This report should be filed through a politically responsible official such as the Attorney General.

24. Work should be undertaken to develop a series of model rules of procedure that would accommodate different decision-making styles and activities. These models should serve as the starting-point for the development of rules of procedure by any newly created agency, and for periodic review by an existing one.

25. To help eliminate unnecessary diversity in federal administrative procedure, agencies should have the political onus, when adopting rules of procedure, to justify deviations from the model rules.

26. Further work should be undertaken towards improving the information sharing, education, consultation, screening and co-ordination that are required for an integrated procedural framework for agency decision making at the federal level. In this respect, further consideration should be given to the creation of a permanent administrative council.

Procedural Rule Making



Key: ------- Choice
— - — Advice or consultation
_____ Binding effect or requirement

[1] If *no Rules* are made, the Legislated Procedural Standards directly govern agency procedure. The agency *is subject to judicial review* for non-compliance with the Legislated Standards.

[2] If *Rules are made*, the Legislated Procedural Standards do *not* directly govern agency procedure. Futhermore, agency Rules are *not subject to judicial review* for departure from the Legislated Standards.

CHAPTER FOUR

A Wider View

This Report has looked at independent administrative agencies largely from a lawyer's perspective. This perspective cannot explain or justify all that agencies do. Neither can it be the single test for the adequacy of the administrative process. Political, economic, social and administrative considerations must also inform the work of an agency, as well as the legal framework within which it operates (see Baldwin and Hawkins, 1984: 580). This, non-lawyers are as qualified to do as are lawyers. Moreover, there is, to many, something suspect in calling upon public administrators to justify issues of public administration before lawyers solely on the basis of legal principles. All of this, we have tried to keep in mind in our analysis and recommendations.

This Report has focussed on agency authority to make "decisions", in the legal sense of the word, although we have recognized that other roles, notably policy making and advising, may be closely associated with the authority to decide. We have stressed that values such as authoritativeness and integrity are particularly important where Parliament places decision-making responsibilities in a body that is outside the departmental structure, and we have emphasized the need for greater encouragement to agencies to take more initiative in policy formulation where the objectives laid down by Parliament require further elaboration.

For some, calling for direct agency accountability to Parliament will appear out of line with our traditions of responsible Government. Parliament has, by and large, relied on the executive to carry out, or to supervise the carrying out of, statutory objectives. Parliament would have to adapt to the role we would give it and, in particular, become more active in evaluating the execution of its legislative objectives. This would necessitate allocating additional resources to perform this role, and initiating a certain realignment of parliamentary and executive responsibilities.

We do not view this recommended change as being fundamentally at odds with our constitutional principles and traditions. In the end, Parliament has a choice when allocating administrative responsibilities. It can either impose direct responsibility for administrative decision making on the executive, as is the usual case in the United Kingdom and Australia, or it can borrow from a congressional system of government and place this responsibility outside the departmental structure, in an independent body. Where this latter course is followed, we believe that a corresponding accommodation should be made to guarantee the integrity of these agencies in the decision-making role they are expected to perform. Direct accountability to Parliament reinforces the independence of the agency by providing

a buffer between it and the executive. We recognize the ultimate control of the executive over questions of administrative policy, but we prefer to see this control, in all but exceptional cases, sifted through a parliamentary process.

We have stressed as well the need for a more rational procedural framework for agency decision making. It was recommended that certain basic process standards be given legislative recognition, and that they be implemented by agencies through a procedural rule-making process. We have cited the educational role of such a framework, not only in providing citizens with a statement of the basic ground rules for administrative decision making and with improved accessibility to the more detailed rules of procedure an agency may follow, but also in providing the agencies themselves with a means to stimulate more cross-fertilization of ideas and approaches. The importance of a rational procedural framework to enhance the accountability of independent administrative agencies for the autonomy they enjoy was also emphasized.

We have argued as well that a framework for procedural rule making would be of considerable assistance in ensuring an appropriate blend of values such as fairness and accountability with those of effectiveness, economy and efficiency. The *Canadian Charter of Rights and Freedoms* has changed the political and legal landscape of this nation, and courts should not be left alone to carry the burden of judgment about the values entrenched in the Charter. Other governmental institutions, notably Parliament and agencies, must take initiatives to give shape and content to Charter values, and to ensure that these are given an appropriate place within the wider value framework that should govern administrative decision making.

Finally, we have stressed the costs that are involved in a system that perpetuates unnecessary discrepancies. We have pointed the way towards greater consistency in federal administrative procedure, towards the development of procedural models and towards more effective co-ordination and screening, all to avoid the proliferation of anomalous and unnecessarily individualized approaches to decision making.

Our approach to administrative law reform involves, therefore, a degree of structuring of administrative authority. We are searching for a legal framework that will allow agencies to get things done, but with due regard for the traditions of our system of political ordering. We seek to balance the constraining forces on agencies (judicialization of decision making, judicial review, executive control), with a strong sense of autonomy, offering them the opportunity to develop more effective tools to accomplish their objectives. We consider our approach to be as "achievement" oriented as it is "control" oriented, recognizing that, for some, the pervasive problem of the administrative system is not overzealousness, but underachievement, particularly in areas of economic regulation (see Economic Council of Canada, 1981: 141-2).

Adjusting the legal framework for statutory decision making will not, of itself, allay underachievement. Other considerations affect an agency's ability to administer governmental objectives. In a democratic system of government, the lack of a political base can be a debilitating factor. Agencies are not close enough to the political centre to have

sufficient authority to achieve many of the ends that some observers would have them accomplish. Economic regulation, for example, is not an activity that has been accepted enthusiastically in this country, either by politicians or by regulatees, at least when carried on with any fervour. Efforts to secure compliance with agency policy are frequently met with failure. Within such a political climate it is not surprising that agencies have often been viewed, and have viewed themselves, as having little to support them but their own convictions. On highly political issues, independence is not always a recipe for achievement.

The manner in which agency members are appointed is a further contributing factor to agency underachievement. The appointment process does not demonstrate sufficient commitment to the importance of their functions. Even the limited consultative mechanisms in the selection of judges, which are informal and themselves subject to continuous abuse and criticism, are absent in the process of agency appointments (see LRCC, 1980: 160). Appointments have traditionally been matters of political prerogative influenced significantly by partisan considerations. Agency membership tends to be dominated by those of political or public service backgrounds, with a sprinkling of private sector representation, emphasizing the closed-shop attitude that is taken towards these positions. Rarely, if ever, are positions advertised and applications invited. Rarely, if ever, are criteria for appointments established and publicly communicated. Rarely, if ever, is there extensive consultation with an agency's constituency before a member is appointed to it; often even the agency head is not consulted. Appointments are frequently "annointments", which do little to enhance an agency's self-image, let alone its image to outsiders, whether in Parliament, government departments or the public. The many excellent appointees that currently occupy office do so in spite of the system, not because of it. The atmosphere does not stimulate achievement, nor does it invite regeneration.

Much political rhetoric has been forthcoming lately about agency appointments, and about the importance of doing something to improve the present procedures. We have not studied the matter in depth, but our experience and intuition compel us to assert with confidence that something needs to be done to counteract the closed nature of the process, the absence of accountability for appointments and the vulnerability of the Government to charges of patronage, with the attendant loss of prestige and public confidence in the agency (see LRCC, 1980: Chap. 8). In particular, we think that each minister who is responsible for making a recommendation to Cabinet with respect to the filling of an appointed position should invite applications and nominations for that position. A minimum step, where a member is to be appointed, would be to consult the head of the agency. The private sector should be consulted more broadly, as well as provincial Governments where the job carries federal-provincial or regional implications. The process would be considerably more credible if each minister were to constitute an advisory committee to assist in the selection of appointees to agencies for which he is responsible. Testing and interviewing skills already developed for public service employment could be used by such a committee to produce a "short list" of the best qualified potential appointees. We claim no monopoly on suggestions. There is room for experimentation. The important thing is that initiatives be taken to reinforce the political commitment of the Government, and of Parliament, to the importance of the work assigned to independent administrative agencies.

A related concern is the vulnerability of agency appointees. While most full-time members have security against arbitrary dismissal, appointments tend to be for relatively short terms, exposing incumbents to the uncertainties of renewal or reassignment. Not only does this raise concerns about the "independence" of these members, it encourages an atmosphere that limits the range of eligible candidates. To accept a position, potential appointees may have to interrupt other pursuits, which themselves may be more rewarding, financially or otherwise, than within the agency. Unless a candidate can secure his re-entry to his former career, the position may seem unattractive. Many qualified candidates may be unwilling to accept an agency position, because of the absence of an established career pattern in agency service. Stringent divestment requirements may further exacerbate this situation. This has led some observers to support a stronger career line within the federal administrative system, stressing the value of developing a cadre of professional administrators who would be capable of moving from agency to agency. A move in this direction would, of course, help with our proposals for a more highly integrated approach to the federal administrative process.

We have no basis for evaluating whether establishing such a career line would significantly enhance the achievement level of an administrative agency. Introducing more tenure into the system would undoubtedly have its negative implications. We believe, however, that the issue merits careful consideration by those who have greater expertise in these areas than ourselves. Attracting highly competent, dedicated and hard-working administrators to these positions is essential if the reforms recommended in this Report are to be successful. To the extent that this goal requires more active canvassing of potential candidates, greater personal rewards and a more stable career environment, then these complementary approaches should diligently be pursued.

Agency performance levels are also affected by a variety of related factors, including budget, organization and management style. Far too little is known about how these factors influence the shape of the process an agency develops for policy and decision making. Here, as elsewhere, we sense that the cost of ignorance is staggering, and the benefits that would come from better knowledge, substantial. There is a need for comprehensive statistical information about agency organization and process. It is regrettable that a pilot project recently undertaken by the Canadian Centre for Justice Statistics to collect data about both federal and provincial administrative agencies was not extended into a permanent and more complete programme. This would have provided agencies with at least some of the information they need to help ensure that their organizational patterns are adequately attuned to their processes for policy and decision making.

On another level, there may well be room for streamlining the federal administrative system through the consolidation of jurisdictions. There may be jurisdiction that should be transferred out of independent agencies into a government department. These are possibilities that the Government will undoubtedly pursue as the capacity of the independent agency to meet programme needs comes under continued critical evaluation as we approach the next century.

In the meantime, this Commission will explore more specific reforms within the broad framework we have outlined. For example, even the best administrative system

will have its "dissatisfied customers". To properly handle their complaints adequate appeal arrangements are required. We have already noted some needed reforms in relation to political appeals and internal review. But consideration must also be given to rationalizing the existing patchwork of external appeals to agencies independent of the original decision makers. A study on administrative appeals is currently being undertaken by this Commission to investigate these and other issues.

Independent administrative agencies are also likely to find themselves having to do "more with less", having to cope with an expanding workload with fewer resources. External influences on the administrative system, such as the Charter, may force some agencies to deal with a considerably increased work-load without an equivalent increase in resources (see *Ford*, F.C. Nov. 23/84 (unreported) and *O'Brien*, F.C. Nov. 23/84 (unreported), in respect of the Parole Board). And although deregulation may reduce agency activity in certain sectors of the economy, the increasing complexity of political, social and economic relations, and the challenge of expanding technology, are likely to place more than compensating demands on Government, and on agencies, in coming years.

We shall be considering over succeeding months, specific limited measures to achieve greater efficiency in agency administration without undue sacrifice of the fairness that is essential to maintaining the integrity of agency decision making. We hope to demonstrate that the framework outlined in this Report can acknowledge the individual character of each agency within a systemic perspective. We shall be consulting broadly to ensure the practicability of these measures, many of which we anticipate will be capable of direct implementation by agencies without legislative reform.

We have not, in this Report, committed ourselves to the independent agency model as being essential for any program presently administered through it. Indeed, we have said that the presumption should operate, in structuring the machinery of Government, that administrative authorities be established within departmental confines unless there are very good reasons for constituting them as independent agencies. Implicit in this recommendation, however, is the recognition of the entrenchment of the independent administrative agency as a government model. Agencies continue to be created in response to new needs, and, notwithstanding the current emphasis on deregulation of economic activity, their activities are, and will likely remain, an important part of modern Government. Consequently, there is a need to work incrementally towards improving the capacity of the model, when it is chosen, to produce administrative decisions that have appropriate regard for efficiency, fairness, integrity, accountability and the other values upon which we have based our analysis and recommendations for reform.

Appendix A

Some Independent Administrative Agencies Exercising Statutory Decision-Making Powers

This is a list of certain agencies we consider, in line with the criteria suggested in this Report, to be sufficiently independent, and to have a sufficient measure of decision-making authority to warrant being called "independent administrative agencies exercising statutory decision-making powers". The list is not exhaustive. Our failure to include a particular agency does not necessarily indicate our intention to exclude it from our recommendations. For instance, our failure to consider granting and marketing activities reflects more our sense of need for more information about, and analysis of, those activities than a conclusion that agencies that exercise them should be excluded.

Nor will there be universal agreement about the appropriateness of our including certain agencies within the list. To some, they may not seem to be either "independent" or to have the power to make "decisions". For this reason we have broken our list into two categories: Category I includes those agencies we feel confident warrant inclusion; Category II includes those whose independence, or whose authority to make a decision, is less obvious, and, in some cases, is open to reasonable debate. For this reason we have added, in Category II, brief notes to support our selection.

Not all functions or activities of the agencies included in the iist would be subject to the recommendations of this Report. Only those that would qualify as statutory decision-making authority, as described in this Report, would be directly affected.

We envisage that any legislation adopted by Parliament to implement the recommendations of this Report would incorporate a more detailed schedule than that prescribed in this Appendix. It should list the agencies and the precise authority in respect of which the provisions would apply. This Appendix is simply a first step in that direction. It provides a reasonably concrete basis upon which further discussion can be held concerning the ambit of the legislation to be enacted.

Category I

Atomic Energy Control Board
Canada Labour Relations Board
Canadian Cultural Property Export Review Board

Canadian Import Tribunal (formerly Anti-dumping Tribunal)
Canadian Pension Commission
Canadian Radio-television and Telecommunications Commission
Canadian Transport Commission
Chief Electoral Officer
Human Rights Tribunals and Review Tribunals
Immigration Appeal Board
Merchant Seaman Compensation Board
National Energy Board
National Parole Board
Northwest Territories Water Board
Pension Appeals Board
Pension Review Board Canada
Public Service Commission Appeal Board
Public Service Staff Relations Board
Tariff Board
War Veterans Allowance Board Canada
Yukon Territory Water Board

Category II

Army Benevolent Fund: The Board grants financial assistance and has powers to recover monies acquired fraudulently or through a false declaration.

Board of Examiners for Canada Lands Surveyors: Although subject to directive powers by the Minister and the Governor in Council, the Board is a non-departmental agency.

Canadian Aviation Safety Board: Strictly speaking, the Board reports to the Minister. However, the Minister must give reasons if he deviates from the Board's report.

Canadian Grain Commission: The Commission issues grain elevator exploitation licences, has the power to impose sanctions, to cancel licences and to impose the payment of indemnities. It also decides upon contributions to be paid or the admissibility to a stabilization regime.

Canadian Human Rights Commission: The decision not to proceed with a complaint is a decision affecting rights.

Canadian Saltfish Corporation: The Corporation issues marketing licences.

Canadian Wheat Board: The Board can exempt a grain elevator from the application of the *Canadian Wheat Board Act*.

Commissioner of Canada Elections: Although subject to control of the Chief Electoral Officer, the Commissioner is not subject to any ministerial controls.

Foreign Investment Review Agency: The recommendations the Agency makes are followed in almost all cases, giving them the appearance of a decision more than that of a recommendation.

Information Commissioner of Canada: The decision not to proceed with a complaint is a decision affecting rights.

Inspector General of Banks: Although responsible to the Minister, the Inspector General is not removable. Although only reporting to the Minister, his reports are often determinative.

National Farm Products Marketing Council: The Council hears appeals from the decisions of marketing agencies. It has the power to examine and overrule marketing plans and quota orders.

Privacy Commissioner: The decision not to proceed with a complaint is a decision affecting rights.

Restrictive Trade Practices Commission of Canada: The Commission makes recommendations to the Minister. However, these are taken very seriously by the parties involved and the processes it follows resemble more those of a decision than those of a recommendation.

Superintendent of Bankruptcy: The Superintendent issues trustee licences, has some powers for the conservation of assets and has powers to seize assets before the appointment of a trustee.

Appendix B

Commentators on Working Paper 25 and This Report

This is a list of persons who have given freely and voluntarily of their time to comment on Working Paper 25 or drafts of this Report.

Jack N. Agrios, Q.C.
Harry W. Arthurs
Paul J. Barker
Jean-Louis Baudouin, Q.C.
François-R. Bernier
Mr. Justice D. Gordon Blair
R.F. Brooks
André Bureau
Dan W. Burtnick, Q.C.,
Nancy Burtt
A.E.H. Campbell
Innis M. Christie
George T.H. Cooper, Q.C.
Pierre-André Côté
Bernard A. Courtois
Richard G. Dearden
Audrey D. Doerr
René Dussault
Howard R. Eddy
C. Geoffrey Edge
D. Paul Emond
Mr. Justice W.Z. Estey
John M. Evans
R.G.L. Fairweather, Q.C.
M. Falardeau-Ramsay, Q.C.
Jacob Finkelman, Q.C.
Pierre Foucher
Robert T. Franson
David J. Fraser
Patrice Garant
D.M.M. Goldie, Q.C.
John Gray, Q.C.
Terrance H. Hall
Grant Hammond
Douglas Hartle
Gustave Hébert
Terence G. Ison
Pierre Issalys
Joseph Jabbra
Hudson N. Janisch
J.H.F. Jennekens
C.C. Johnston
David H. Jones, Q.C.
Russell Juriansz
T. Gregory Kane
Donna S. Kaufman
Kenneth Kernaghan
Mark R. Krasnick
Thomas S. Kuttner
Mr. Justice Gérard V. La Forest
Virginia Lajeunesse
F.H. Lamar, Q.C.
M. Lapointe, Q.C.
John Lawrence, Q.C.
Alan Leadbeater
Mr. Justice Gerald E. Le Dain
Denis Lemieux
Marie-Josée Longtin
Paul Lordon
Alastair A. Lucas
Gaétan Lussier
J. Noel Lyon
A. Wayne MacKay
Charles A. Marvin
Sandra K. McCallum
Mary K. McFadyen

Hilton A. McIntosh, Q.C.
Judge Alice McKeown
Wade McLaughlin
Eric A. Milligan
Stephen J. Mills
Johann W. Mohr
Henry L. Molot
Mr. Justice F.C. Muldoon
David J. Mullan
Ross Nugent, Q.C.
William R. Outerbridge
Miles H. Pepper, Q.C.
Michael L. Phelan
Margot Priest
A. Paul Pross
T. Murray Rankin
Edward Ratushny
Mr. Justice Robert F. Reid
John D. Richard, Q.C.
Phil Rogers
Andrew J. Roman
N. Schultz
Maureen Shea-Desrosiers
James L. Shields
David W. Slater
W.T. Stanbury
O.G. Stoner
John C. Tait, Q.C.
Andrew R. Thompson
Claude Thomson, Q.C.
David A. Townsend
L.L. Trudel
Greg VanKoughnett
C. Gaylord Watkins
H.I. Wetston
Bruce H. Wildsmith
Bryan Williams, Q.C.

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